

**RECORD OF TRIAL
COVER SHEET**

**IN THE
MILITARY COMMISSION
CASE OF**

**UNITED STATES
V.
SALIM AHMED HAMDAN**

ALSO KNOWN AS:

**SALIM AHMAD HAMDAN
SALIM AHMED HAMDAN
SALEM AHMED SALEM HAMDAN
SAQR AL JADAWY
SAQR AL JADDAWI
KHALID BIN ABDALLAH
KHALID WL'D ABDALLAH**

No. 040004

VOLUME ____ OF ____ TOTAL VOLUMES

1ST VOLUME OF TRANSCRIPT

**FOR AUGUST 24, AND
NOVEMBER 8, 2004 SESSIONS
(REDACTED VERSION)**

United States v. Salim Ahmed Hamdan, NO. 040004

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A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at <http://www.defenselink.mil/news/commissions.html>.

The volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.

After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to this administrative certification.

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Review Exhibit (RE) 22-A-1 has two parts—a sealed portion and an unsealed portion.

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UNITED STATES

v.

MILITARY COMMISSIONS HEARING

SALIM AHMED HAMDAN
a/k/a Salim Ahmad Hamdan
a/k/a Salem Ahmed Salem Hamdan
a/k/a Saqr al Jadawy
a/k/a Saqr al Jaddawi
a/k/a Khalid bin Abdallah
a/k/a Khalid wl'd Abdallah

held at

Guantanamo Bay, Cuba

on

24 August 2004

PERSONS PRESENT:

PRESIDING OFFICER: Colonel Peter E. Brownback III, USA

PROSECUTION COUNSEL: Commander [REDACTED]
Captain [REDACTED]

DEFENSE COUNSEL: Lieutenant Commander Charles D. Swift, USN

MEMBERS:

Colonel [REDACTED]
Colonel [REDACTED]
Colonel [REDACTED]
Lieutenant [REDACTED]

ALTERNATE MBR: Lieutenant Colonel [REDACTED]

COURT REPORTERS: Gunnery Sergeant [REDACTED]
Sergeant [REDACTED]

The Commissions Hearing was called to order at 1006,
24 August 2004.

PO: This military commission is called to order.

P (CDR [REDACTED]) This military commission is convened by Appointing Order number 04-0004, dated July 13, 2004; copies of which have been furnished to the members of the commission, counsel, and the accused, and which will be marked as Review Exhibit 1 and attached to the record.

There are no corrections noted to the appointing order. The presidential determination that the accused may be subject to trial by military commission has been marked as Review Exhibit 2. Sir, I am providing Exhibits 1 and 2 to the court reporter at this time.

PO: Thank you.

P (CDR [REDACTED]) The charge has been properly approved by the appointing authority and referred to this commission for trial. The prosecution caused a copy of the charge in English and Arabic, the accused's native language, to be served on counsel for the accused on August 6th, 2004 in accordance with counsel's request to personally serve the accused. The prosecution is ready to proceed in the commission trial of United States v. Salim Ahmed Hamdan.

The accused, Commission Members, and Alternate Commission Member named in the appointing order and detailed to this commission are present. All detailed counsel are present.

[REDACTED] [REDACTED] [REDACTED] has been detailed court reporter for this commission and has previously been sworn.

A security officer has been detailed for this commission and has previously been sworn.

The interpreters have been detailed for this commission and have been previously sworn. The full names of the interpreters who are providing interpretation for today's hearing are contained in Review Exhibit 3, a copy of which has been previously provided to the defense and to the recorder for inclusion in the record.

PO: Previously signed with the consent of counsel for both

sides was RE 3 (sic), the protective order. Is there anyone left to be sworn, Commander?

P (CDR [REDACTED]) Yes, sir. Sergeant [REDACTED] the bailiff, requires to be sworn in, sir, and I am prepared to administer the oath.

PO: Please swear her.

The bailiff was sworn.

PO: I have been designated as the Presiding Officer of this military commission by the appointing authority and I have previously been sworn. The other members of the commission and the alternate member will now be sworn. All persons in the courtroom, please rise.

The members were sworn.

PO: The commission is now assembled.

Before continuing with preliminary matters, it is necessary for me to inquire into the accused's need for an interpreter.

Mr. Hamdan, are you able to understand and speak English?

ACC: No.

PO: What language do you speak?

ACC: Arabic language.

PO: As previously noted, certified appointers have been -- appointed interpreters have been appointed to this case. Do you understand the language being used by the interpreters?

ACC: Yes.

PO: Please be seated.

Prosecutor, please tell me who detailed you and your qualifications.

P (CDR [REDACTED]) Yes, sir, all members of the prosecution team have been detailed to this military commission by the chief

prosecutor. All members of the prosecution are qualified under Military Commission Order Number 1, Paragraph 4(B), and we have previously been sworn. No member of the prosecution has acted in any manner which might tend to disqualify us in this proceeding. The detailing document has been marked as Review Exhibit 5, and I am having the bailiff provide it to you, sir.

PO: Mr. Hamdan, pursuant to Military Commission Order 1, you are now represented by Commander Swift. He has been provided to you at no expense. You can also represent -- request a different military lawyer to represent you. If the person you request is reasonably available, he or she would be appointed to represent you free of charge. However, if you request another military lawyer, and that lawyer is made available, normally Commander Swift would be released. You could, though, request that Commander Swift stay on your case.

You may also be represented by a civilian lawyer who is qualified. This lawyer would represent you at no expense to the government. He or she must be a United States citizen and certified to practice law in the United States, be eligible for a secret clearance, and agree in writing to comply with the orders and regulations of the commission. If you have a civilian lawyer, your detailed counsel would remain on the case, and your detailed counsel would be present -- will remain on the case, and your detailed counsel will be present during the presentation of all evidence.

Do you understand what I just told you?

ACC: Yes.

PO: Do you have any questions about representation before this commission?

ACC: No.

PO: Do you want to be represented by Commander Swift and no other counsel?

DC (LCDR Swift): May we have a moment, sir?

PO: (Indicating)

Accused and counsel conferred.

PO: Do you want to be represented by Commander Swift and no other counsel?

ACC: I need Commander Swift and I need an assistant as well.

PO: Please repeat the translation.

ACC: I need attorney Swift to represent me and I need an assistant with him as well.

PO: Please be seated.

Commander Swift, have you made a request for assistant counsel on the case?

DC (LCDR Swift): Several, sir. None have been granted yet.

PO: Okay. Are you prepared with your client to go forward with this proceeding without an assistant?

DC (LCDR Swift): I am prepared for the limited purposes of this proceeding.

PO: Mr. Hamdan, I want you to take a moment and talk to your counsel. He has told me that he is prepared to go through the hearing today without an assistant. Please -- and that he has made several requests for an assistant defense counsel. Please discuss with your counsel whether or not you believe that he is prepared to go forward today.

ACC: I agree.

PO: Commander Swift, you are prepared to go forward today?

DC (LCDR Swift): Today, I am, sir.

PO: Okay. Thank you, please be seated.

Prosecution, defense, after we finish up here I would like both of you to prepare a memorandum to the chief defense counsel reporting Mr. Hamdan's request to him. Thank you.

P (CDR [REDACTED]) Yes, sir.

DC (LCDR Swift): Yes, sir.

PO: Commander Swift, would you please now announce your detailing qualifications.

DC (LCDR Swift): Sir, and to the commission, I have been detailed to this military commission by the Chief Defense Counsel. I am qualified under Military Commission Order Number 1, Paragraph 4(C), and I have been previously sworn. I have not acted in any manner that might tend to disqualify me in this proceeding. The document detailing me as counsel has been previously furnished to the Military Commission, and I request that it be marked as a review exhibit.

PO: Thank you, please be seated.

DC (LCDR Swift): If I might, sir.

PO: You may.

DC (LCDR Swift): Additionally, for the commission's information seated with me at counsel table are my interpreter, who is not an attorney, but assists me in communication with Mr. Hamdan, and my paralegal, LNL [REDACTED] who is not an attorney but assists me with note taking for the purposes of this proceeding.

PO: Thank you. All person --

DC (LCDR Swift): Actually, one other administrative matter I noted.

PO: Yes.

DC (LCDR Swift): I would like to put on the record at some point the two meetings that we had.

PO: I was going to, but you can put them on right now if you want.

DC (LCDR Swift): Certainly, sir. On 23 August, at 1300, there was meeting with the Presiding Officer, the prosecution --

PO: Composed of Commander [REDACTED] and Captain [REDACTED]

DC (LCDR Swift): Yes, sir, and myself. During this meeting we discussed the script for conducting this hearing, considerations for the translators, the need for a

security officer, and the fact that at that time we did not yet have one, implications of delaying this hearing vis-a-vis the media, voir dire, how we would handle challenges for cause if any, Mr. Hamdan's mental fitness for trial, how to handle upcoming motions, government and defense's viewpoints regarding the assistant to the presiding officer, General Hemmingway's memo to the presiding officer, and how to handle any requests for continuance made at this hearing.

PO: Do you have anything you want to add to that?

P (CDR [REDACTED]) No objection and nothing to add, sir.

PO: I would note that some of those matters were handled as part of the modification to the trial script.

DC (LCDR Swift): Yes.

PO: And how about the meeting this morning?

DC (LCDR Swift): Yes, sir. This morning we met again at 0900.

PO: Same parties?

DC (LCDR Swift): Same parties, sir. We discussed the question of how to certify, or present, interlocutory questions to the appointing authority by the presiding officer. Again, reviewed how we would handle the motions for today, briefly discussed the issue of headphones for the interpreters, and were notified during the meeting that the CCTV feed was out and that we might have to delay or consider -- and we requested to consider delaying to restore it.

P (CDR [REDACTED]) Sir, no objections to those facts. Just for the record the issue with the headphones was engaged upon by the prosecution team, and the headphones were provided to the defense.

PO: Good stuff. Anything else?

DC (LCDR Swift): No, sir.

PO: Thank you.

All personnel appear to have the requisite qualifications, and all personnel required to be sworn

have been sworn.

P (CDR [REDACTED]) Sir, if I could, I would like to mark so that we keep --

PO: Mark away --

P (CDR [REDACTED]): -- in order, the memorandum detailing the defense counsel as Review Exhibit 6, and I have marked the charge sheet as Review Exhibit 7, and I can provide those to the bailiff to provide to the court reporter.

PO: Commander Swift, you have been given a copy of the charge already; right?

DC (LCDR Swift): Yes, sir, I have.

PO: All parties to the trial have been furnished with a copy of the charges. The prosecutor will announce the general nature of the charge.

P (CDR [REDACTED]): The general nature of the charges in this case is conspiracy to commit the offenses of attacking civilians, attacking civilian objects, murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent, and terrorism.

PO: Members, and the alternate member, this time is appropriate for you to review the charge sheet and the appointing order there in the packets in front of you. Before you look at the charge sheet, please turn to the appointing order.

Is your data correct on that, Colonel [REDACTED]

CM [REDACTED] Yes, it is.

PO: Colonel [REDACTED]?

CM (Col [REDACTED]): Yes, it is.

PO: Colonel [REDACTED]?

CM (Col [REDACTED]): Yes, it is.

PO: Lieutenant Colonel [REDACTED]?

CM (LtCol [REDACTED]) Yes, it is.

PO: Lieutenant Colonel [REDACTED]

CM (LtCol [REDACTED]): Yes, sir.

PO: Thank you. Take a moment and look at the charge sheet please.

The panel members did as directed.

PO: While they are reviewing the charges, Commander [REDACTED] was the security officer previously sworn?

P (CDR [REDACTED]): Yes, sir, he was. Also, sir, one other detail in the marking of the exhibits, I believe that Review Exhibit 3 was the document containing the interpreters names, and Review Exhibit 4 was the protective order relating to the interpreters.

PO: Thank you. Okay. Great.

P (CDR [REDACTED]): Thank you, sir.

DC (LCDR Swift): Sir, while again while reviewing, Mr. Hamdan had difficulty understanding the summary of charges when they were read by them. He did not really understand the translation when it was read to him. Could we have that part redone?

PO: Would you please, while the members are reviewing the charge sheet, stand up and restate the general nature of the charges.

P (CDR [REDACTED]): Yes, sir. The general nature of the charge in this case is conspiracy to commit the offenses of attacking civilians, attacking civilian objects, murder by unprivileged belligerent, destruction of property by an unprivileged belligerent, and terrorism.

PO: Commander Swift?

DC (LCDR Swift): He seems to understand, sir.

PO: All members had an opportunity to review the charges? Apparently so.

Does either side want the charges to be read in open court? Trial?

P (CDR [REDACTED]) Prosecution does not.

DC (LCDR Swift): One moment, sir. We waive reading of the charges, sir.

PO: The reading of the charges may be omitted.

Okay. Members of the commission and alternate member, the appointing authority who detailed you to this commission has the ability to remove you from service on this commission for good cause. Is any member, or alternate, aware of any matter that you feel might affect your impartiality, or ability to sit as a commission member, which you have not identified previously in the questionnaire you filled out? Before you answer please keep in mind that any statement you might make should be in general terms.

CM (LtCol [REDACTED]) No, sir.

CM (Col [REDACTED]): No, sir.

CM (Col [REDACTED]) No, sir.

CM (Col [REDACTED]) No, sir.

CM (LtCol [REDACTED]): No, sir.

PO: Apparently not. Okay.

I have previously filled out a commission member questionnaire. I previously provided counsel for both sides a summarized biography, a list of matters that one would ordinarily expect counsel to ask during a voir dire process, and a document concerning my knowledge of the appointing authority and other persons. I also provided all counsel with answers to other questions suggested by defense counsel. These documents will now be marked as the next RE in order. The documents are true to the best of my knowledge and belief. That document will be RE 8.

Does either side wish to voir dire me outside the presence of other members?

P (CDR [REDACTED]) No, sir.

DC (LCDR Swift): Yes, sir.

PO: The other members will retire to the deliberation room.

The panel members exited the hearing room.

PO: Please be seated. Let the record reflect the other members have left the deliberation room.

I intend to keep a copy of RE 8 with me during voir dire so counsel may direct me to a specific question.
Objection?

P (CDR [REDACTED]) No, sir.

DC (LCDR Swift): No, sir.

PO: Prosecution, voir dire?

P (CDR [REDACTED]) Sir, I believe Commander Swift requested to question you, so --

PO: No, he requested voir dire outside the presence of other members.

P (CDR [REDACTED]) Aye, sir.

PO: They are gone.

Do you want to voir dire me?

P (CDR [REDACTED]) Not at this time, sir.

PO: Commander Swift?

DC (LCDR Swift): We don't have a podium, sir. Permission to move to the court table.

PO: (Indicating)

DC (LCDR Swift): Sir, I would like to start by clarifying your membership in the Virginia bar. You indicated that you had been admitted to practice in the Virginia bar, I believe since the 1970s; is that correct?

PO: Yes.

P (CDR [REDACTED]) What? I didn't understand.

DC (LCDR Swift): I will restate the question. I would like

you -- what -- as a member of the Virginia bar what is your current position in the bar?

PO: I am an associate member of the Virginia bar.

DC (LCDR Swift): What does associate member mean?

PO: You would have to ask the Virginia bar. I have never practiced law in the civilian sector.

DC (LCDR Swift): Are you eligible to practice law in Virginia currently?

PO: I am an associate member of the Virginia bar. I am eligible to practice in Virginia if I change my status to active member.

DC (LCDR Swift): What would be required to do that?

PO: I would have to take some -- a CLE.

DC (LCDR Swift): So at this time you are not eligible to practice there?

PO: At this time I am not an active member of the Virginia bar.

DC (LCDR Swift): Are you a member in good standing --

PO: Go on.

DC (LCDR Swift): Are you a member in good standing of any other U.S. court.

PO: We have got a problem, Commander Swift. The audience cannot hear you. We are going to have to do something. I don't know if you could remove the microphone. I don't know if you can move the microphone.

DC (LCDR Swift): I will stay back here, sir.

MJ: I am only a member of the Virginia bar. That's the only bar I am a member of.

DC (LCDR Swift): Sir, would you be eligible to serve as a civilian defense counsel for this commission proceedings?

PO: I don't know. I haven't examined that.

DC (LCDR Swift): It requires you to be in good standing and a member of a court.

PO: I don't know. I haven't examined that. That question has been addressed in a CAAF case I believe.

DC (LCDR Swift): I am aware of the CAAF case, sir.

PO: Okay. Go on.

DC (LCDR Swift): You indicated that you volunteered?

PO: Yes, I did.

DC (LCDR Swift): Why?

PO: I retired in 1999 and I had no desire to do anything particularly. I had ten years of experience as a military judge, and I thought I was good at it. As a matter of fact, I still think I was good at it; and knowing the stresses and strains brought upon our military by the current operational environment and recognizing that retired people could serve, I volunteered.

DC (LCDR Swift): You in that question indicated you had been in a former military judge. Did you view when you were volunteering that you were volunteering to be a judge here?

PO: No. I viewed that I was volunteering to be a presiding officer.

DC (LCDR Swift): What did you think the presiding officer would do?

PO: At the time that I initially volunteered, the only document that had been written was MCO Number 1 -- excuse me, as well as the president's military order. I went to a dictionary and looked up presiding, and I thought that a presiding officer would preside. If you are asking me if I was aware of all of the differences between a military judge and a presiding officer, I couldn't say that I was. However, I knew that I was not volunteering to be a military judge.

DC (LCDR Swift): You mentioned that the military order and the Presidential's order had been written at the time that you volunteered. Did you read both of those documents before you volunteered?

PO: I scanned them.

DC (LCDR Swift): After scanning them, did you believe that the process was lawful?

PO: I choose not answer that question at this time. Thank you.

DC (LCDR Swift): Understand that you won't answer the question. You have an open mind now to the question of the lawfulness of the process?

PO: That's a good question. Yes, I believe that the lawfulness of establishing the commission process by the President, the lawfulness, the delegation to the Secretary and to the general counsel are all matters which may be addressed by motion. And, I believe that it is the duty of counsel to educate all members of the commission on the law.

DC (LCDR Swift): As part of your assignment or as part of being assigned as presiding officer, you have been detailed an assistant to the presiding officer?

PO: Yes.

DC (LCDR Swift): Can you describe how that happened?

PO: I believe I put the dates in my questionnaire, but basically on the 29th of June, I believe, Lieutenant Colonel [REDACTED] who works in the office of the military commissions, e-mailed me and said words to the effect of we are looking for someone to be an assistant to the presiding officer. Do you have any suggestions? Immediately and without giving the person in question a chance to comment I said, yes, [REDACTED] And I pointed out that I was aware of [REDACTED] and his good sides and his bad sides. After that, Colonel [REDACTED] e-mailed me back for his e-mail address and they talked.

DC (LCDR Swift): Was he appointed as your assistant?

PO: There was a detailing agreement. There is a detailing

agreement between Mr. [REDACTED] and -- no, between the [REDACTED] part of the [REDACTED] which is where Mr. [REDACTED]

DC (LCDR Swift): Can you explain what his duties are?

P (CDR [REDACTED]): Sir, at this time I am going to object. What we are trying to determine is whether you are qualified to preside over this proceeding. Mr. [REDACTED] is not a voting member and we feel this line of questioning is unwarranted.

PO: Thank you. Go on. Just tell me, ask me your question.

DC (LCDR Swift): I will get quickly to it, sir.

PO: That is fine.

DC (LCDR Swift): You supervise Mr. [REDACTED] is that correct?

PO: Yes.

DC (LCDR Swift): Mr. [REDACTED] has had contact with the appointing authority; is that correct?

PO: Yes.

DC (LCDR Swift): Did he do so at your direction?

PO: He has done many -- he has had many contacts with the appointing authority at my direction. He has had many contacts with the appointing authority at my consent. He has had many contacts with the appointing authority that I didn't hear about until after he talked to him. His duties are divided into various ranges. For instance, he has been here since the 9th of August arranging to get things done. When the CCTV broke down this morning, he was the one who arranged to get it fixed. When your interpreter couldn't get a head set, he was the one to whom you came to get a head set. That's one set. He also is the best person I have ever known for drafting, writing, coordinating, and publishing procedures; and he works in that area. He also functions to work out the procedural aspects of the cases. For instance, he has provided to all counsel on this case a listing of all the motions and responses and

whatever. Okay, those are three general areas.

DC (LCDR Swift): I want to address, second, the publishing and drawing of scripts, et cetera.

PO: Okay. Go on.

DC (LCDR Swift): Does he work exclusively for you in that capacity or has he worked exclusively for you in that capacity?

PO: On the 19th of August I believe, I could be wrong, the appointing authority published a memorandum stating that [REDACTED] exclusively for me. So there you know -- just a second, we know from the 19th he works for me; right?

DC (LCDR Swift): Yes, sir.

PO: Okay. Before that he provided, and you have got copies of all of this, various suggestions to the office of military commissions on how to write or create procedural changes and the procedures for these commissions. There.

DC (LCDR Swift): Was that after charges had been referred against Mr. Hamdan?

PO: Right.

DC (LCDR Swift): So he was writing how to change the procedures after the charges had been referred?

PO: Right.

DC (LCDR Swift): And you viewed that as appropriate?

PO: Yeah, I did.

DC (LCDR Swift): It didn't concern you that it would be ex post facto changes after we had established a commission and charges had been referred to it?

PO: I didn't consider that the changes would come into effect in any time to affect anyone. These were changes to the commission procedures as a whole, not changes necessarily affecting Mr. Hamdan and if you believe that they would then I would have expected you to file some

motion saying that these procedures can't be changed because they would affect Mr. Hamdan adversely.

DC (LCDR Swift): To date, I don't know that any have; but I know communication has occurred.

PO: Thank you.

DC (LCDR Swift): So I would respond that until they actually are changed there is no ex pos facto issue.

PO: Thank you. I agree.

DC (LCDR Swift): What I am concerned about though is that there is conversations about changing and applying them to ex pos facto.

PO: Okay, that's that concern. Go on.

DC (LCDR Swift): Other than the meetings that we put on the record earlier, have you met with military counsel regarding those proceedings in the past?

PO: I had that meeting with all the counsel on or about, all the counsel who were in D.C. on or about the 15th of July. And I had a meeting with all the counsel who showed up yesterday on the 23rd of August.

DC (LCDR Swift): During that meeting on 15 July, did you express an opinion regarding speedy -- the right of any detainee to a speedy trial?

PO: No, I didn't.

DC (LCDR Swift): I wasn't at the meeting, but I was told that you did. I don't --

PO: Thank you.

DC (LCDR Swift): Did you mention speedy trial at all?

PO: Speedy trial was mentioned. Article 10 was mentioned, and there was some general conversation. I didn't take notes at the meeting. It was a meeting to tell people who I was and asking them to get -- start on motions and things.

DC (LCDR Swift): But you didn't expect -- while those things were

mentioned, you don't recall expressing an opinion yourself?

PO: No. I didn't have any motions or anything.

DC (LCDR Swift): Now, based on the trial script that we have been provided, you intend to instruct the members on the law; is that correct?

PO: Yes.

DC (LCDR Swift): How are you going to avoid having an inordinate influence in respect to each of their opinions while doing that?

PO: I don't understand your question.

DC (LCDR Swift): Well, historically and certainly barrowing from the judge's bench book, it says that each member should have an equal weight in deciding any opinion. Here they are deciding both fact and law. How, after you have instructed them, will they have the opportunity to have an equal opinion as to what the law is?

PO: You refer to the trial script. Did you read farther what I said there?

DC (LCDR Swift): I did.

PO: What did I say?

DC (LCDR Swift): In that portion, you said that they were free to disagree with you.

PO: And?

DC (LCDR Swift): I also read --

PO: Come on.

DC (LCDR Swift): -- in the trial script where you say to them, "I am the only lawyer; and therefore, I will instruct you on the law." Don't you agree that that gives you positional authority?

PO: Commander Swift, if you are going to read something let's read it all.

DC (LCDR Swift): Yes, sir.

PO: As I am the only lawyer appointed to the commission. Now that is a fact; right?

DC (LCDR Swift): That is true, sir.

PO: I will instruct and advise on the law. However, the President has directed that the commission will decide all questions of law and fact, so you are not bound to accept the law as given to you by me. So what have I told them, okay -- I am not going to argue the point. The point is that they are all military officers. They have all sworn to do their duty and I will advise them on the law as I have been required to do. And, I don't see how you can get around that.

DC (LCDR Swift): My concern comes in their ability after being instructed that you are a lawyer, and you know the law, that you will have an unequal voice in any deliberations. That is something to be avoided, looked at ranks, looked at procedures, that's not happening, and how would we avoid that with the current instruction that we have? It says you are free to disagree, but I am a lawyer and I am probably right.

PO: Whoa, whoa, it does not say that. But that -- okay, so you object to the instruction?

DC (LCDR Swift): Yes, sir. In determining not only on the instruction also concerned is in your ability to sit as the senior member or as the presiding officer that you will ensure that each member has an equal voice in every decision.

PO: I will.

DC (LCDR Swift): Lastly, influence -- yesterday, during the meeting -- during our meeting yesterday, it was discussed whether we would hold up these proceedings pending the appointment of a security officer. Do you recall that, sir?

PO: Yes.

DC (LCDR Swift): During that, you mentioned that holding it up would have an impact vis-a-vis the media. Do you agree with that?

PO: If you say I did. I believe what you say, but go on.

DC (LCDR Swift): At least by that statement, it sounds like the media is having an impact on how you are making decisions.

PO: No. I think what that statement meant was that having been the poor person who had to orchestrate getting hundreds of people to various places at various times, that I sympathize and that we would do what we could to handle it. For instance, this morning with the CCTV broke down, we delayed -- we have delayed the start of these proceedings --

DC (LCDR Swift): We have a translation issue, sir. When we switched translators, he is no longer understanding anything being said.

PO: Can we switch to another translator? The court is addressing the table of translators -- the commission is addressing -- I am addressing the table of translators. Can we switch to another translator?

The translators changed positions.

PO: For instance, this morning when we had that CCTV break, we delayed the proceeding for 30 minutes to start so that the feed to the off-site viewing location could be established. If you mean am I concerned about what the media says or writes about me, no.

DC (LCDR Swift): Understand, sir. I don't have any further questions.

PO: Challenge?

P (CDR [REDACTED]) I have some additional questions, sir.

PO: Go on.

P (CDR [REDACTED]) Sir, Military Commission Order Number 1 states that a presiding officer needs to be a military officer whose a judge advocate of any United States armed force. As you sit here today, do you meet that criteria, sir?

PO: Yes.

P (CDR [REDACTED]) Sir, you received some questions from Commander

Swift about whether the establishment of commissions was lawful and the executive order was lawful. As you sit here today, have you made any predeterminations with respect to those questions?

PO: All of the counsel in the courtroom are familiar with the Uniform Code of Military Justice. If an order is patently illegal, that is one thing. However, if an order is questionable, which apparently some people thinks it is, then an officer or any member of the service has a duty to comply while determining whether or not it is illegal.

P (CDR [REDACTED]) Now, sir, the notice of motions for the defense was due on the 19th of August. Have they filed any such notice of motion challenging the legality of those orders?

PO: That -- please sit down, Commander Swift. You look like you are about to jump. Don't jump. Don't worry about that.

P (CDR [REDACTED]) Sir, will the role of the assistant to the presiding officer in any way impact your ability to fairly decide matters in this case?

PO: In so far as he takes so much off my back, yes, it will because I don't have to worry about all the admin stuff that he has been sucking up. But in terms of his impacting my vote, my voice, no.

P (CDR [REDACTED]) Now you say that there have been several contacts between [REDACTED] you used the term, appointing authority.

PO: I thought I said OMC, but maybe I didn't. I meant the circle around Mr. Altenburg?

P (CDR [REDACTED]) So that doesn't necessarily mean he is speaking with Mr. Altenburg directly, but could be speaking to the staff person of Mr. Altenburg?

PO: Right.

P (CDR [REDACTED]) Sir, the issue of speedy trial was brought up and we have, in fact, have notice of motions provided concerning speedy trial. Is there anything as you sit here right now which will impact your ability to fairly

decide those motions?

PO: No.

P (CDR [REDACTED]) As far as your interaction with the other members, do you consider them to have equal votes in this case?

PO: Yes.

P (CDR [REDACTED]) Do you consider them to be on equal footing with respect to votes as to what the law is?

PO: Yes.

P (CDR [REDACTED]) If they need or request assistance, not being legally trained as you are, in trying to determine what the law is will you take steps to get them that assistance?

PO: To get them what?

P (CDR [REDACTED]) Assistance to help them understand the law?

PO: Yes.

P (CDR [REDACTED]) Sir, are you aware of any actions or are underway to hire court clerks to assist the other commission members?

PO: I received -- and I forget when it was -- in the last month a draft, I believe, of a hiring of someone, a position nomination for someone to work in the office of the presiding officers. Where that is I don't know.

P (CDR [REDACTED]) Sir, is the media in any way going to impact your ability to fairly decide this case?

PO: No.

P (CDR [REDACTED]) If it is a question to providing the accused a fair trial and accommodating the media, where will that decision lie?

PO: We have spent a lot of money to get six people here to look at Mr. Hamdan across this table. We are here so that these six people can carry out to President's order to provide a full and fair trial for Mr. Hamdan.

P (CDR [REDACTED]) I have no further questions, sir.

PO: Thank you.

DC (LCDR Swift): May I have a moment?

PO: Yes.

DC (LCDR Swift): Sir, in your answers to Commander [REDACTED] you indicate that you take steps to assist the other members understanding the law. What steps would those be?

PO: Well, since I don't know -- I am not being sarcastic -- I don't know what the situation would be. The first step is that counsel will provide motions on the law and the second step is that counsel will be allowed to argue what the law is. If the commission members decide that they need any more instruction on the law, then I will decide that then. I don't know. I don't know what they are going to need. I can't tell you what the steps are right now.

Now, some -- you can't predict something about a situation that hasn't arisen yet, Commander Swift. I'm sorry. If your concern is this -- and I don't know why you have been walking around it -- sir, are you going go back in there and say, okay, y'all, I am a lawyer and you are not and this is the law and you got to listen to me. Is that your concern basically?

DC (LCDR Swift): I do not believe you would be, sir. I am more concerned, not that you would intentionally do such a thing, I don't think you would. My concern is how a lawyer is inevitably viewed by other staff officers. It is the equivalent of my wife, who is a pilot, and I sitting in the cockpit seat and today we are going to fly an airplane and I look over and she says put the throttles forward.

PO: Okay. So is your compliant about me or about any lawyer?

DC (LCDR Swift): My concern is how we can minimize this position and how those steps would be taken to prevent it.

PO: I can't tell you what I will do in an unspecified situation. I can tell you that I am not going to say, I have been a judge for ten years and a JAG for 27 years and you got to tell -- you got to do what I tell you

about the law. That's the first thing I can tell you. The second thing is that if they need more assistance on the law I imagine and I don't know, Commander Swift, because it hasn't arisen, that if they need more instruction on the law, I will call you and Commander [REDACTED] back into court and say -- I am using his name in vain -- Colonel [REDACTED] is your question the application say of IN RE Sierra to 42 U.S.C. 1933, and he will say, yes. And I will say, Commander [REDACTED] would you explain your views on that; and he will say, whatever. And I will say, does that answer your question; and you will say something, I don't know.

DC (LCDR Swift): I understand, sir.

PO: Okay. However if you feel the urge, I always welcome briefs on any matter. That's not an order for a brief. If you want to put it in, feel free. Okay, what else, what other follow up do you have, Commander Swift?

DC (LCDR Swift): No other follow up.

PO: Challenge?

P (CDR [REDACTED]): Prosecution has no challenge.

DC (LCDR Swift): I would like to recess to consult with my client regarding --

PO: Well, I understand that, but I mean I am asking really what sort of recess do you need? Five minutes in place or fifteen minutes in the office?

DC (LCDR Swift): Fifteen minutes in the office, sir.

PO: Court is in recess.

The Commission Hearing recessed at 1115, 24 August 2004.

The Commission Hearing was called to order at 1142, 24 August 2004.

PO: The commission will come to order. Let the record reflect that only the Presiding Officer is in the commission room. The other members are not present. Defense?

P (CDR [REDACTED]) Sir, before we go further, we have a new court reporter, Sergeant [REDACTED] and she has previously been

sworn.

PO: Thank you.

DC (LCDR Swift): Yes, sir. Before entering challenges, would you permit me one more question, sir?

PO: Yeah.

DC (LCDR Swift): When you said that you are a judge advocate, were you recertified when you came back off of active -- off of retirement, or do you base that on you previously being a judge advocate?

PO: To the best of my knowledge and belief, Major General Tom Rummy -- Thomas Rummy, who is the Judge Advocate General, personally approved my retirement recall, and he is the one who certifies people as judge advocates.

DC (LCDR Swift): And you base that on your belief -- on that belief?

PO: Yeah.

DC (LCDR Swift): Notwithstanding, sir, we do challenge the Presiding Officer for cause. We have three -- excuse me, four areas.

One, we challenge the qualifications of the Presiding Officer as a judge advocate based on being recalled from retired service and not being an active member of any Bar association at the time he was recalled.

Two, despite, we understand that this is almost necessarily by the position you've been placed in, we challenge the Presiding Officer based on that the fact that he will exercise improper influence over the other members.

PO: Okay. I want to make sure you clarify this. Are you challenging the system, or are you challenging me? Because the standard is good cause that I will not perform my duties.

DC (LCDR Swift): We're challenging you, sir.

PO: Okay.

DC (LCDR Swift): We are also challenging based on the multiple contacts that you have had, either through your assistant, or through yourself with the appointing authority. I understand that you said that this is not going to influence you in any way. We believe that it creates the appearance of unfairness, and at least at that level, we challenge on that.

Additionally, based on -- although I did not attend the meeting of 15 July -- based on consultation with counsel that did, we challenge you based on having formed opinions prior to court regarding the accused's right in this trial -- the accused's right to a speedy trial in this case.

PO: Anything else?

DC (LCDR Swift): No, sir.

PO: What do you say?

P (CDR [REDACTED]) Sir, defense counsel said they're not challenging the system, they're challenging you personally. But they also said during voir dire, I don't think you would ever do anything intentionally unfair. So if it's a challenge to the individual, the prosecution doesn't believe we can do any better than a person who the defense concedes would never intentionally do anything unfair.

The defense has stated many things about conversations between the appointing authority and [REDACTED] and the appointing authority and yourself. Specifically, during those conversations between you and defense counsel on voir dire, he stated there's been no prejudice. So as we sit here today, you are not tainted, there has been no prejudice to the defense, and we have had recent changes with respect to the August 19th memo, which should preclude any appearance of this happening in the future.

Sir, we have no challenge and do not feel that there is any cause to challenge you as the Presiding Officer.

PO: I've considered your challenges for cause, Commander Swift. Under the provisions of MCI 8, I'll forward to the appointing authority for his decision and action, a transcript of the voir dire, which will include your

challenge and the reasons therefore, and the comments made by counsel. I will also forward the Presiding Officer's voir dire packet, which I believe is RE 8.

Are there any other matters that you would wish to be forwarded to him for his decision?

DC (LCDR Swift): I would wish to be able to brief, as it did come up during the course of this, the issue of qualifications.

PO: When do you think you could have that prepared?

DC (LCDR Swift): Certainly no later than next Monday.

PO: Okay. Well?

DC (LCDR Swift): I'm somewhat at a loss while down here to do that type of thing. But I can complete it by next Monday.

PO: If you will forward that to [REDACTED] and he will provide you with any cross-whatever this is to this matter, and then forward it to me, and I will get it to the appointing authority.

Anything else that should go up with this?

DC (LCDR Swift): The defense has nothing else, sir.

PO: Well, I mean the packet to the appointing authority.

P (CDR [REDACTED]) Nothing from the prosecution.

PO: Okay. Under the provisions of MCI 8 paragraph 3(a)(3), I will not hold the proceedings in abeyance.

Okay. Please recall the other members.

The members entered the courtroom.

Please be seated. The commission will come to order. Let the record reflect that all of the members of the commission are present.

Have all the commission members completed a member questionnaire?

Apparently so.

Have both counsel been provided copies of the member questionnaires?

DC (LCDR Swift): Yes, sir.

P (CDR [REDACTED]): Yes, sir, I have.

PO: Prosecutor, please have the members questionnaires marked as the next RE in order.

P (CDR [REDACTED]): Sir, I've marked them Review Exhibits 9A through [REDACTED]

[REDACTED] And I'm handing to the bailiff for delivery to the court reporter.

PO: Those questionnaires will be under seal.

Okay. Members, I'm now going to ask you a few preliminary questions. If any member has an affirmative response to any question, please raise your hand. As I ask these questions and make reference to the members, this refers to both the Commission Members and the alternate. And if I failed to state it, the alternate came in with the other members.

Does any member know the accused?

Apparently not.

Does any member know any person named in the charges?

Apparently not.

Does any member know any of the counsel -- Captain [REDACTED] Commander [REDACTED] Commander Swift -- involved in this case?

Apparently not.

Members, having seen the accused, having read the charges, do any of you feel that you cannot give the accused a fair trial for any reason?

Apparently not.

Do any of you have any prior knowledge of the facts or events in this case that will make you unable to serve impartially?

Apparently not.

Do any of you feel that you cannot vote fairly and impartially because of a difference in rank, or because of a command relationship with any other member?

Apparently not.

Members, later I am going to instruct you as follows: As I am the only lawyer appointed to the commission, I will instruct you and advise you on the law. However, the President has directed that the commission, meaning all of us, will decide all questions of law and fact. So you are not bound to accept the law as given to you by me. You are free to accept the law as argued to you by counsel either in court, or in motions.

In closed conferences, and during deliberations, my vote and voice will count no more than that of any other member. Can each member follow that instruction?

Apparently so.

Is there any member who believes that he would be required to accept, without question, my instruction on the law?

Apparently not.

Have any of you had any dealings with any of the parties to the trial, to include counsel for either side, other members, including myself, which might affect your performance of duty as a commission member in any way?

Apparently not.

Do any of you feel that you cannot fairly and justly decide this case because of any prior experiences related to previous military assignments or duties?

Apparently not.

Do any of you feel that you cannot fairly and justly decide this case because of something you have read,

heard, or seen in the media concerning the events of 9/11, al Qaida, Usama bin Laden, or terrorism generally?

Apparently not.

Have any of you been a victim of an alleged terrorist attack, or had a close friend or family member who was a victim of an alleged terrorist attack?

Apparently not.

Okay. As commission members, we've got to keep open minds regarding the verdict until all of the evidence is in. The verdict can only be based on evidence received during the proceedings, and you may not rely upon prior knowledge of the facts or events no matter how you got this knowledge. Is there any member who cannot follow this instruction?

Apparently not.

Mr. Hamdan is presumed innocent. This presumption remains unless or until his guilt is established beyond reasonable doubt. The burden to establish Mr. Hamdan's guilt is upon the prosecutor. Does each member understand and agree with this principle, and further agree to follow this principle in deciding this case?

Apparently so.

Does any member know of anything of either a personal or a professional nature which would cause you to be unable to give your full attention to these proceedings throughout the trial?

Apparently not.

Are any of you aware of any matter that might raise a substantial question concerning your participation in this trial as a commission member?

Apparently not.

Any general voir dire of the members, trial? Not individual, general.

P (CDR [REDACTED]) Yes, sir. May I proceed, sir?

PO: Pardon?

P (CDR [REDACTED]) May I proceed, sir?

PO: Yes, I'm sorry.

P (CDR [REDACTED]) Good afternoon, gentlemen. My name is Commander [REDACTED] Captain [REDACTED] and I represent the prosecution in this case. As all members participating before this commission, we're here to ensure a full and fair trial, and we have a few general questions we'd like to ask of all of you.

Since arriving in Guantanamo Bay, has anyone from the media attempted to talk to you or discuss this case with you?

PO: Apparently not.

P (CDR [REDACTED]) This trial will most likely require your full attention and may play out over several months. Does anyone have anything of a personal or professional nature that would limit your ability to participate over the next several months.

PO: Apparently not.

P (CDR [REDACTED]) Can all members set aside any feelings generated by the attacks of 9/11, and render a verdict in this case that's based solely on the evidence presented?

PO: Apparently so.

P (CDR [REDACTED]) All of you expressed in the questionnaires you filled out previously some concerns for your families as a result of your service on this commission. Do all members feel they can remain impartial towards all parties, and despite those concerns, fairly decide this case?

PO: Apparently, so.

P (CDR [REDACTED]) Also reviewing your previously filled out questionnaires --

PO: Let me note for the record that those questionnaires will be appended at sometime to the record, or they were.

P (CDR [REDACTED]) They were, 9A through E, sir.

PO: Yeah, 9A through E. Okay.

P (CDR [REDACTED]) All of you have naturally seen some news reports on Afghanistan, al Qaida, and other pertinent topics. Can you set aside the generalized information from those reports and decide this case based on the facts presented here?

PO: Apparently, so.

P (CDR [REDACTED]) We thank you. We have no further questions.

PO: General?

DC (LCDR Swift): Good morning, sirs. My name is Lieutenant Commander Charles Swift, and -- I'm too far from the microphone -- and I represent Salim Ahmed Hamdan in this case, and I also have some questions.

Start with, does every member understand what the term "jurisdiction" means in the context of judicial proceedings? Do you understand what that means? They're going to be doing this a lot.

PO: Okay. Members, I'll instruct you on jurisdiction. Basically -- and I, of course will be glad to receive instructions from counsel -- jurisdiction means the authority of a court to hear a case.

DC (LCDR Swift): We would agree with that.

In this case, now having understood what jurisdiction means, in this case, you've been provided with a finding being by the President of the United States that Mr. Hamdan is a person subject to the jurisdiction of this tribunal. The defense challenges --

PO: For the record, I keep waiving my hand at Commander [REDACTED] at Commander Swift, I even do it to myself. It's because we have a translator here who needs to have us talk slowly. It is not trial, it's not defense, it's not just me, it's all three of us. Go on. I apologize for interrupting you.

DC (LCDR Swift): No problem, sir. It's going to take some getting used to.

I'll start the question again. In this case, you've been provided with a finding by the President of the United States that Mr. Hamdan is a person subject to the jurisdiction of this tribunal. The defense challenges this finding.

Is each of you willing to consider whether the President's finding is, in fact, lawful?

PO: Apparently so.

DC (LCDR Swift): Apparently so? All are willing to consider that?

PO: Apparently so.

DC (LCDR Swift): Does any member believe that the President's finding is evidence that Mr. Hamdan committed a crime?

PO: Apparently not.

DC (LCDR Swift): That's a negative response from all members.

Does any member believe that the President, in making his findings -- let me restate that. Does any member believe that the President's findings are evidence that Mr. Hamdan has committed a crime?

PO: Will defense agree that a prerequisite to getting this case before this commission was that the President made such a determination?

DC (LCDR Swift): The defense agrees to that, sir.

PO: The Presidential determination was provided to you to show that this -- these charges were properly brought to this court. The determination is not evidence. Everybody understand that?

Apparently so.

DC (LCDR Swift): And to go back, it was -- in saying that it was lawfully brought, that means that that was a step necessary; it does not necessarily mean that the decision itself was lawful.

PO: Could you rephrase?

DC (LCDR Swift): One of my previous questions -- one of my previous questions was, whether every member was willing to consider whether the President had lawfully brought Mr. Hamdan to this -- before this trial, whether he was within the jurisdiction of the commission.

PO: They did agree to that.

DC (LCDR Swift): Yes. I want to clarify that it is a step, but it is not in and of itself evidence that it is lawful.

PO: Okay.

DC (LCDR Swift): Every member agree with that?

PO: Apparently so.

DC (LCDR Swift): Additionally, Mr. Altenburg, who was the appointing authority for this commission, he approved and referred the charges that you have before you. Does any member believe that because Mr. Altenburg approved that charge, that it states a valid offense against the law of war?

PO: Okay. All members understand that the charges were referred to this commission by Mr. John Altenburg who was delegated that duty under the order, the MCO, and the MCIs. All members understand that?

And all members understand that by the document you got, the approval of the charge and the referral, Mr. Altenburg decided that this case should come before this commission. Do you all understand that?

I believe that Commander Swift's question, and he will correct me, is, do you all understand that whether or not Mr. Hamdan is guilty of anything is solely for this commission to determine after hearing all the evidence; and that what Mr. Altenburg did was just a step to get the charges here? Do you all understand that?

Apparently so.

DC (LCDR Swift): All of that is true, but my question wasn't exactly that.

PO: Well, that's why I said you could clarify.

DC (LCDR Swift): Yes, sir. In addition, one of the things the defense is challenging is that the offense stated is, in fact, a violation of the law of war; that is does it fall within the violations as recognized in international and national law as a law of war violation? To use a lawyer's term, does it even state an offense? What I'm asking is whether you all are willing to listen with an open mind as to whether or not that is true or not?

PO: As to whether or not the offense states a violation of the law of war?

DC (LCDR Swift): That's correct.

PO: Is each member willing to consider, based on submissions by counsel, and the evidence that comes before the commission whether or not the offense as charged does, in fact, violate law of war?

Apparently so.

P (CDR [REDACTED]) Sir, we're going to object to the way that was phrased. We do not desire to argue this during voir dire, but we do think there's a legal issue as to what he characterized --

PO: Thank you.

P (CDR [REDACTED]) -- someone can be convicted of before this commission.

PO: Okay. Members, you're all willing to listen to the arguments from both sides and the evidence; correct? And what the President did in referring this, and what -- or making a determination, and what Mr. Altenburg did in referring this is not going to affect your decision on findings of guilt; right?

Apparently so.

I can't go any farther than that.

DC (LCDR Swift): Yes, sir.

PO: Go on.

DC (LCDR Swift): In order to decide issues of law, which you were

previously instructed you were going to do, you'll be required to consider the meaning of international treaties, the custom and practice as established by military regulations, handbooks, and international cases throughout the world, as well as the Constitution of the United States, federal judicial opinions, and federal statutes. This will require considerable study on your part. Is each of you able to devote the necessary time to gain a complete and independent understanding of the issues of law raised in the case?

Affirmative response from all members.

As Colonel Brownback previously told you, he is the only lawyer on the panel. In this case, do any of you believe that Colonel Brownback's opinion of the law carries a greater weight than your own? His opinion of -- or what he tells you the law is, is it more valid than what you think?

PO: Okay. Are you going to name the members who are giving you responses?

DC (LCDR Swift): I've received a response from Colonel [REDACTED] that's negative, he doesn't believe that the opinion will sway him; Colonel [REDACTED] has responded that the law is the law.

Colonel [REDACTED] do you agree that your opinion is equal?

CM (LtCol [REDACTED]): Yes.

DC (LCDR Swift): Colonel [REDACTED]

CM (Col [REDACTED]): Yes, sir.

DC (LCDR Swift): And thank you. It's also going to, of course, be your duty as commission members to weigh the evidence and resolve controverted questions of fact. In so doing, if the evidence is in conflict, you will necessarily be required to give more weight to some evidence than others. It is, of course, your discretion to decide how much weight to give any piece of evidence. However, it is expected that you will use the same standards in weighing evidence -- in weighing and evaluating all of the evidence with that in mind. Is any member less likely to believe the testimony of a Yemeni citizen because of their country of origin,

religious or political beliefs, or their relationship to Mr. Hamdan?

Negative response from all members.

Does any member believe that the testimony of a U.S. law enforcement agent is more likely to be true solely because of the agent's position in law enforcement?

Negative response from all members. Thank you.

Does any member believe that the testimony of a U.S. service member is more likely to be true solely because of the agent's position in law enforcement?

Negative response from all members. Thank you.

In weighing and evaluating the evidence, you're expected to use your common sense and your knowledge of human nature and the ways of the world. Does every member agree that the ways of the world are different in Yemen than they are in the United States?

PO: Apparently so.

DC (LCDR Swift): Does any member have any more than a passing knowledge of Yemen?

Negative response from all members.

The defense is going to present you experts regarding the social customs and practice, living conditions in Yemen. Is each of you willing to consider this testimony, if you find it credible, in evaluating the evidence?

Affirmative response from all members.

This case will also involve as we're seeing right now --

P (CDR [REDACTED]) Sir, at this point I'm going to object. It appears he's arguing the facts of his case rather than finding out if these individuals are qualified to sit for this command.

PO: Thank you, Commander [REDACTED] Go on.

DC (LCDR Swift): Thank you, sir. This case will also involve

issues of translation; that is, statements that have been translated from either Arabic to English, or English to Arabic. Does any member speak Arabic? I didn't think you did from your questionnaires.

PO: Apparently not.

DC (LCDR Swift): No member here speaks Arabic.

Does every member agree that translation is not an exact science?

PO: Apparently so.

DC (LCDR Swift): The quality of translation depends largely on the skill of an individual translator. Is every member willing to consider translation errors in considering the reliability of evidence that will be presented to them?

PO: Apparently so.

DC (LCDR Swift): Thank you. The next questions -- the next group of questions that I'm going to ask you has to do with sentencing. This is difficult because, of course, Mr. Hamdan has not been convicted of any crime, and these questions should not be taken by you as to indicate a belief on my part that Mr. Hamdan is guilty of any crime.

PO: Counsel only have one opportunity to voir dire you, and that's why counsel is asking you questions about sentencing now, because there won't be an opportunity later. Go on.

DC (LCDR Swift): Thank you, sir. And I'll skip the next part because the Presiding Officer just said it.

The range of punishment available to you is anywhere from no time -- no time in confinement to a maximum of life imprisonment. You must be able to consider the entire range. Is every member willing to give the entire range of punishments due consideration?

PO: Apparently so.

DC (LCDR Swift): In deciding what punishment, if any, again, if convicted, to award, is each member willing to consider

Mr. Hamdan's educational level, his background, his rehabilitative potential, his role in any crime for which he's convicted?

PO: Might be. For any crime that he might be convicted.

DC (LCDR Swift): Might be convicted, and the fact that he is not a U.S. citizen or resident; and as such is not under an affirmative duty to obey U.S. law?

PO: Are y'all willing to consider all those matters if we get to sentencing and determining a proper sentence?

CM (Col [REDACTED]): Explain the last part, the very last phrase.

PO: That's from Colonel [REDACTED]

DC (LCDR Swift): Yes, sir. The last phrase in it, sir, is that Mr. Hamdan is not a citizen, nor a resident of the United States. As such, he would not expect to have an affirmative knowledge of U.S. law or U.S. customs and social practices. So he doesn't have -- generally, we all have a duty to obey international law; but in deciding a punishment, looking at equivalent U.S. punishments may not be appropriate. And I just ask that you consider that.

P (CDR [REDACTED]): Objection. That's in direct violation of a rule, sir.

PO: Thank you, Commander [REDACTED]
Anything else, Commander Swift?

DC (LCDR Swift): Yes, sir. In deciding -- does any member, having read the charges and specifications, believe that you would be compelled to vote for any particular punishment?

PO: Apparently not.

DC (LCDR Swift): Negative response from all members.

Whether you're aware of it or not, you will soon be aware that in April of this year, I instituted a civil law suit against the President of the United States, Secretary for Defense, Mr. Altenburg, and General Hood on behalf of Mr. Hamdan regarding the legality of these

commissions and his detention. Does any member believe that I acted improperly in doing so?

PO: Okay. Members, do all members understand the role of defense counsel, in that they have a duty -- and especially military counsel, have a duty zealously to defend their clients. All members understand that; right?

Apparently so.

Does any member have any complaint or objection to counsel performing that role zealously?

Apparently not.

DC (LCDR Swift): But I would still like the reaction if anybody believes that in my zealous representation hearing that, that I somehow stepped over the bounds.

PO: Apparently not.

DC (LCDR Swift): Does any member believe that I acted unprofessionally?

PO: I don't believe the members are capable of answering that question at this time.

DC (LCDR Swift): I meant it not so much as an attorney, but as an officer, sir.

PO: Okay. As I pointed out earlier, military defense counsel are detailed, they're ordered to perform they're tasks, like being ordered to jump out of a plane or fly an airplane or take a hill, it's a duty. Go on.

DC (LCDR Swift): I have no further questions of the members in individual -- in group voir dire, sir.

PO: Okay. Members, we're now going to have various segments of individual voir dire.

Okay. Under the rules, and y'all read this stuff yesterday, I am required to determine if a challenge for cause is made what matters should be forwarded to the appointing authority for his action on that challenge for cause, whether it's against one of y'all or against myself. I'm also required to determine if physically

the proceedings should be held in abeyance, whether we should just stop while action is being taken. And I am required to ensure that voir dire remains focussed on the proper subject. That's why I'm going to be remaining in the courtroom during your all's individual voir dire. Any questions?

No, don't stand up yet. I intend to start individual voir dire and drive on. Objection?

P (CDR [REDACTED]): No objection, sir.

DC (LCDR Swift): One moment, sir.

PO: Okay.

DC (LCDR Swift): Sir, could we have a 15-minute recess before starting individual voir dire? Bathroom break.

PO: Okay. Counsel, it appears to me, and this is not your fault --

DC (LCDR Swift): Yes, sir.

PO: -- it appears to me that there's no such thing as a 15-minute recess. Just the logistics involved aren't going to permit it. If you want a recess now, and that's fine with me, let's make it what, 30 minutes, Commander [REDACTED] or 45 minutes so that y'all can bring in -- is there going to be -- does someone -- has someone gotten food for Mr. Hamdan? Yes, someone's gotten food for Mr. Hamdan, he can eat his lunch, and we can come back at 1300 and start on individual voir dire.

Is that okay with you, Commander [REDACTED]

P (CDR [REDACTED]): Yes, sir.

PO: Okay with you?

DC (LCDR Swift): Yes, sir.

PO: Okay. And what they'll be doing -- well, we'll discuss that after the members leave the courtroom. So we will be prepared to start individual voir dire at, say, 1305; okay?

Okay. The members will retire and we will call the

first of you at 1305.

All rise.

The members exited the courtroom.

Please be seated. The commission will come to order. Let the record reflect that the members and the alternate members -- and if I forget to name the alternate member, please advise me if I have neglected to do it -- having left the courtroom. You got any questions on individual voir dire for any members?

P (CDR [REDACTED]): All of them, sir.

PO: We don't have to worry about you telling me, Commander. They're coming in. I'm going to bring them in in order of rank, [REDACTED] I intend to make available to each member and the alternate member a copy of their questionnaire they prepared just so they can look at. You have it if you want to focus them on Question Number 63; all right?

Okay. Now, does it appear likely, Commander [REDACTED] that your questioning of any member or alternate member will go into an area which will require a closed session?

P (CDR [REDACTED]): No, sir.

PO: Commander Swift?

DC (LCDR Swift): It does appear likely, but I'd like to ask each of them if they believe we'll be going into a closed -- into an area of --

PO: Okay. Well, let me --

DC (LCDR Swift): I'd like to ask the question to the member, give them a chance to say that that would be secret. They know best, they were there.

PO: Okay. We will then, unless there's objection from counsel, proceed like this: We will go through individual, nonclosed voir dire. We will then determine scriatum -- in sequence, I'm sorry, if any of the members need to be recalled to a closed session. If they do, we will hold a closed session for all of the closed session individual voir dire. And if you have

challenges for cause, based on closed session voir dire responses, you will make those challenges during the closed session. At which point, we will then open the proceedings, and you may make challenges on nonclosed session matters. Did I say that correctly?

DC (LCDR Swift): I understood it, sir.

P (CDR [REDACTED]): Got it, sir.

PO: I must have said it correctly. Okay. No objections?

P (CDR [REDACTED]): Nothing further.

DC (LCDR Swift): Nothing further, sir.

PO: Commission's in recess until 1300.

The Commission Hearing recessed at 1229, 24 August 2004.

*The Commission Hearing was called to order at 1317,
24 August 2004.*

PO: The commission will come to order. Let the record reflect that the presiding officer, Colonel [REDACTED] are present for individual voir dire. We have a new court reporter. Gunny again, right?

P (CDR [REDACTED]): Gunnery Sergeant [REDACTED] yes, sir.

PO: Thank you.

Individual voir dire, trial?

P (CDR [REDACTED]): Thank you, sir. Good afternoon, Colonel.

CM (Col [REDACTED]): Good afternoon.

P (CDR [REDACTED]): Colonel, I would like to follow up on some issues that came up when you were being questioned as a group. When the defense counsel was questioning he stated what he believed the sources of law that you are to apply in deciding this case are, and we don't intend to argue right now whether he was correct or not. Although, I will raise that we disagree with what he told you. Do you agree, that as you were instructed you are to determine what law to apply in this case?

CM (Col [REDACTED]): Yes.

P (CDR [REDACTED]): Now, sir, there are orders -- orders and instructions applicable to these military commissions. Have you had the opportunity to review those?

CM (Col [REDACTED]): Yes, I have.

P (CDR [REDACTED]): Assuming that you find these orders and instructions have been lawfully issued, you agree to follow those orders and instructions?

CM (Col [REDACTED]): Yes.

P (CDR [REDACTED]): Now, the defense counsel, when discussing whether he had jurisdiction in the case and the presiding officer explained the meaning of the term jurisdiction, the defense only referred to violations of the law of war. Now, do you understand the jurisdiction of military commissions applies both over violations of the laws of war, as well as other crimes triable by military commission, and that you will get briefs from the parties on this issue?

CM (Col [REDACTED]): Yes.

P (CDR [REDACTED]): Now, during the group questioning the defense counsel, mentioned a civil lawsuit that he filed on behalf of his client. Do you understand that that lawsuit will only be relevant before this commission if it has some link to a legal, or factual, question that you must determine?

CM (Col [REDACTED]): Yes.

P (CDR [REDACTED]): Now, sir, getting into your questionnaire that I have reviewed and that you previously filled out.

PO: Let the record reflect that I am handing Colonel [REDACTED] a copy, as I stated before, the questionnaire that he prepared in case you wish to focus him on some particular area.

P (CDR [REDACTED]): Thank you, sir. Sir, focussing on Question 1 appears to disclose a professional relationship between you and Colonel [REDACTED]. Could you elaborate on that?

CM (Col [REDACTED]): Yes. My current duty as chief of staff of

[REDACTED]

P (CDR [REDACTED]) Is there any kind of reporting relationship between the two of you involving raters of fitreps, or anything of that nature?

CM (Col [REDACTED]) No, our common -- his rater is the base Commanding Officer; my rater is the commanding general of the Marine Corps Combat Development Command.

P (CDR [REDACTED]) Do you feel there is anything involved in this professional relationship with Colonel [REDACTED] that would impact your ability to independently decide the facts of law related to this case?

CM (Col [REDACTED]) None at all.

P (CDR [REDACTED]) Thank you, sir. Now, in response to Question 17 of your questionnaire, you indicated you thought that the publicity associated with this case might impact your family. Do you have any specific concerns of that nature, sir?

CM (Colonel [REDACTED]) None, specific, but I'm sure it is not very hard as I put in my question for people to find out where you live; and I am sure that if anybody should determine that they want to take action that they would know where I live and of course my family lives there.

P (CDR [REDACTED]) And, sir, in view of those concerns can you fairly and impartially perform your duty as a commission member?

CM (Col [REDACTED]) Yes.

P (CDR [REDACTED]) Now, sir, in response to Question 35 you wrote that your regiment in Desert Storm captured thousands of prisoners?

CM (Col [REDACTED]) Yes.

P (CDR [REDACTED]): Were you involved in any interrogations of captured personnel?

CM (Col [REDACTED]) No, I was the -- it wasn't my regiment, of course; [REDACTED] And I wasn't personally involved in the capture of any of the prisoners, nor was I involved in the interrogation of any of them.

P (CDR [REDACTED]) So is it fair to say nothing involved with your Desert Storm experience would impact your ability to sit as a commission member?

CM (Col [REDACTED]) That is a fair statement.

P (CDR [REDACTED]) Thank you for your time, sir.

DC (LCDR Swift): Good afternoon, sir.

CM (Col [REDACTED]) Good afternoon.

PO: Once again I note to the participants that when I waive my hand at Colonel [REDACTED] I am doing so -- or any other member -- solely to try to get them to slow down because the translators are agonizing at length.

DC (LCDR Swift): My client would also like to thank you for that.

Colonel, first I would like to address to the questions regarding the instructions. You have had an opportunity to read over the instructions and orders in this case?

CM (Col [REDACTED]) Yes, I have.

DC (LCDR Swift): Did you note when you read over that the instructions, for instance, were issued by the General Counsel of the Department of Defense?

CM (Col [REDACTED]) Yes.

DC (LCDR Swift): Did you note that they were issued, I believe, in 2003?

CM (Col [REDACTED]) I don't know the specific dates, but I did note the dates on the documents as I read them.

DC (LCDR Swift): Do you believe that the general counsel, because an instruction is issued by the general counsel, that it is necessarily indicative for instance of what are the crimes chargeable by a military commission?

P (CDR [REDACTED] Sir, I don't understand.

PO: Could you tell me what you mean by that?

DC (LCDR Swift): Yes, sir.

PO: Or tell Colonel [REDACTED] actually?

DC (LCDR Swift): Yes, sir. The general counsel is of course is to provide legal advice to the Secretary of Defense. Do you believe that solely because his -- I am going to use for an example Instruction 2 that outlined the crimes that he believed were triable by military commission. Do you believe that that instruction constitutes the law as -- constitutes the crimes triable by military commission, or do you believe that it is your responsibility to determine what are crimes triable by military commission?

PO: Colonel [REDACTED] you have received a copy of the charge sheet in this case?

CM (Col [REDACTED] Yes, I have.

PO: You have already said that you understand that the charge has been referred to this commission to determine if an offense was committed; correct?

CM (Col [REDACTED] Correct.

PO: You have also stated that the fact that the charge is written and signed and sent here does not indicate to you that a crime has been committed?

CM (Col [REDACTED] Correct.

PO: Now, does it matter to you as you are sitting here whether the general counsel of the Secretary of Defense or some Captain JAG is the one who wrote those offenses that are before you?

CM (Col [REDACTED] No.

PO: You are going to determine whether an offense was committed based on the evidence brought before you?

CM (Col [REDACTED]): Correct.

DC (LCDR Swift): I am not sure and this comes from my inartful phrasing of the question, and I would like to try again. Do you believe that the general counsel by virtue of his role and delegation from the President is the authoritative source for what are violations of the law of war?

PO: Colonel [REDACTED] have you already agreed to listen to what the counsel tell you what the law of war is?

CM (Col [REDACTED]): Yes. I guess another way to answer your question is do I think they made a mistake?

DC (LCDR Swift): Or could have made a mistake?

CM (Col [REDACTED]): Anybody can make a mistake.

DC (LCDR Swift): So you are willing to listen --

CM (Col [REDACTED]): Anybody can make a mistake.

DC (LCDR Swift): Thank you, sir. You know Colonel [REDACTED] you indicated that on your questionnaire; is that correct?

CM (Col [REDACTED]): Yes, I did.

DC (LCDR Swift): How long have you known him?

CM (Col [REDACTED]): Since April -- well, probably about April the 19th.

DC (LCDR Swift): Prior to coming down did you discuss with him you have been both assigned to this commission?

CM (Col [REDACTED]): That we were both assigned, yes.

DC (LCDR Swift): When was that?

CM (Col [REDACTED]): I think we were notified on June the 29th.

DC (LCDR Swift): Briefly, can you describe that discussion?

CM (Col [REDACTED]): I received a phonecall from the commission that

told me I was selected to do this. The person that called me said there was another Marine. I asked them if they were at liberty to say that. They said he was at the same base and told me it was Colonel [REDACTED] I don't know what day of the week that was, but the next time I saw Colonel [REDACTED] either he or I said I guess we are both on that commission.

DC (LCDR Swift): Did you have any discussion beyond that?

CM (Col [REDACTED]) No.

DC (LCDR Swift): If both you and Colonel [REDACTED] ultimately end up sitting on the commission, would you be more likely to give any weight to his arguments, or his opinions, over the other commission members because you know him?

CM (Col [REDACTED]) No.

DC (LCDR Swift): Are you likely to give less argument or less weight to his arguments or opinions because you know him?

CM (Col [REDACTED]) No.

DC (LCDR Swift): I notice also that you have been involved in military justice as a member before; correct?

CM (Col [REDACTED]) Yes.

DC (LCDR Swift): You understand, obviously, that this is a completely different process than a court-martial?

CM (Col [REDACTED]) Yes.

DC (LCDR Swift): And that as such there is no judge, in fact, you are one of the judges?

CM (Col [REDACTED]) Yes.

DC (LCDR Swift): You also, I notice, administered nonjudicial punishment as a commanding officer?

CM (Col [REDACTED]) Yes.

DC (LCDR Swift): You understand that the standard of proof here is much higher than at NJP?

CM (Col [REDACTED]) Yes. The rules of evidence apply here and the elements of the charge, unlike NJP.

DC (LCDR Swift): Also I believe that NJP is a preponderance of the evidence where here it is beyond a reasonable doubt?

CM (Col [REDACTED]) Right.

DC (LCDR Swift): I would correct one part, the rules of evidence are not exactly in play here, sir.

CM (Col [REDACTED]) Right, but I mean like the elements of proof like in the court-martial that don't apply in an NJP.

DC (LCDR Swift): I understand. You indicated that you were a CO of several reserve Marines. Do I have that right?

CM (Col [REDACTED]) Yes. In the Marine Corps the regimental commanders -- in the Marine Corps the regimental commanders of the reserve regiments are active duty. So

DC (LCDR Swift): [REDACTED]

CM (Col [REDACTED]) [REDACTED]

DC (LCDR Swift): [REDACTED]

CM (Col [REDACTED]) [REDACTED]

DC (LCDR Swift): As CO did you go to his funeral?

CM (Col [REDACTED]) Yes, I did.

DC (LCDR Swift): Did you meet with his family?

CM (Col [REDACTED]) Yes, I did.

DC (LCDR Swift): What were your impressions?

CM (Col [REDACTED]) Of what?

DC (LCDR Swift): During the course of that meeting did it affect you?

CM (Col [REDACTED]): I have been a battalion commander. I have been a regimental commander. I have been in the Marine Corps 28 years. It is not the first Marine that, unfortunately, that I have seen die, whether he was on or off duty in the Marine Corps. The death of every Marine I have known or served with has a deep affect on me, but it is no different that that Marine's worth is no more or less than the other Marines, unfortunately, that I have served with who have been killed.

DC (LCDR Swift): Did you go to the site, to the former site of the World Trade Centers as the CO with your people down there?

CM (Col [REDACTED]): Yes, I did.

DC (LCDR Swift): When was that?

CM (Col [REDACTED]): I don't know the exact date. I would estimate it was probably two weeks after the bombing.

DC (LCDR Swift): What affect, if any, did that have on you, personally? Describe how you felt?

CM (Col [REDACTED]): It is a sad sight. A lot of destruction there. Hard to fathom what was there and what was left.

DC (LCDR Swift): Were you angry, sir?

CM (Col [REDACTED]): I would imagine everybody that saw it was angry.

DC (LCDR Swift): Do you still think about it, sir?

CM (Col [REDACTED]): That visit to there?

DC (LCDR Swift): Yes, sir.

CM (Col [REDACTED]): No.

DC (LCDR Swift): You said that you have received multiple information briefs regarding al Qaida, Taliban, et cetera. Is anything in those briefs classified?

CM (Col [REDACTED]): Yes.

DC (LCDR Swift): Well, obviously we shouldn't -- I do want to know more about the briefs that you received, but can you give me a general overview of the briefings without going into the classified, or should we just wait for a closed session?

CM (Col [REDACTED]) I can give you a general overview.

DC (LCDR Swift): Then if we could go to that. What types of briefings have you received regarding -- what types of briefings have you received regarding al Qaida, generally?

CM (Col [REDACTED]) Mainly briefings about the organization, its history, origin, and their activities. And these were not specific briefings for me, but briefings that the staff received as part of weekly, or bi-weekly intelligence updates.

DC (LCDR Swift): Unless it's classified, who gave the briefings?

CM (Col [REDACTED]) I don't know the Marine's names, but they are the Marines in the building from where I am from, the Marine Corps Intelligence Activity.

DC (LCDR Swift): I inartfully raised that question. I was more interested in the organization than the individual.

CM (Col [REDACTED]) The organization?

DC (LCDR Swift): That gave the briefing?

CM (Col [REDACTED]) The Marine Corps Intelligence Activity.

DC (LCDR Swift): Did anyone else give you briefings beyond the Marine Corps Intelligence Activity?

CM (Col [REDACTED]) No.

DC (LCDR Swift): When did the briefings occur?

CM (Col [REDACTED]) Well, let me back up. I am sure although I don't know who specifically gave them that I received briefings somewhere between January of 99 and July of 2000 at the 2d Marine Division at Camp Lejeune, North Carolina. But the other briefings from the Marine Corps intelligence activity occurred between August of 2002 and probably for eight months off and on.

DC (LCDR Swift): Yes, sir. Without again, unless it is classified, let's talk about organization of al Qaida that you were briefed on. Were you -- in the organization were you shown how -- did this briefing explain how al Qaida had and currently functions?

CM (Col [REDACTED]) These weren't detailed briefs specifically on that subject. These were intelligence updates, okay. Sometimes weekly, more often twice a month. So regardless of the subject there might have been three slides in that portion of the brief and the briefer might have said two or three sentences about that subject because these were update briefs.

DC (LCDR Swift): I understand.

CM (Col [REDACTED]) So I am not sure I have the recollection to answer your question and be real sure of the answer.

DC (LCDR Swift): Well that in itself answered the question because the next one was anything in that brief had an impact on your ability to determine the facts in this case independent of what you have already been briefed on?

CM (Col [REDACTED]) No.

DC (LCDR Swift): And I understand you really don't have a strong recollection of any particular detail?

CM (Col [REDACTED]) No.

DC (LCDR Swift): I don't have any further questions at this time.

PO: Thank you. You may return to the deliberation room. Please ask Colonel [REDACTED] to come in.

There is some problems with joint procedures here. In the Army we don't stand when it is a single member coming in. You all can stand if you wish, but in the Army we don't do it. Please be seated.

Let the record reflect that Colonel [REDACTED] has left the courtroom and Colonel [REDACTED] has entered the courtroom.

Let the record reflect that I am handing Colonel [REDACTED] a copy of his questionnaire in case you want to refer to it as discussed previously. Trial?

P (CDR [REDACTED]) Thank you, sir. Good afternoon, Colonel [REDACTED]

CM (Col [REDACTED]) Good afternoon.

P (CDR [REDACTED]) Sir, in reviewing your questionnaire, there appears to be a professional relationship between you and Colonel [REDACTED]. Could you describe that?

CM (Col [REDACTED]) [REDACTED]

P (CDR [REDACTED]) Sir, based on that relationship there is no fitness report or rate of relationship involved?

CM (Col [REDACTED]) With Colonel [REDACTED] no there is not.

P (CDR [REDACTED]) Sir, anything involved with your relationship with Colonel [REDACTED] that would cause you to not vote independently or decide issues on your own?

CM (Col [REDACTED]) Not at all.

P (CDR [REDACTED]) Sir, getting back to some of the issues that got brought up when you were being questioned as a group, the defense counsel in one of their questions stated what they thought the sources of law were with respect to this commission. That is not something we want to argue right now, but it is a characterization that the prosecution disagreed with. Do you agree, as you were instructed before, that you're the determiner of the law and the fact involved in this case?

CM (Col [REDACTED]) I believe that will be the case.

PO: Carry on.

P (CDR [REDACTED]) Thank you, sir. Colonel [REDACTED] another thing brought up was the discussion of jurisdiction and the presiding officer defined what that was for you. The defense counsel portrayed the jurisdiction exists for violations of the law of war where it is the prosecution's contention that it also exists for other offenses triable by military commission. Do you agree that counsel will brief these issues and you will have

to make a determination of what that law is?

CM (Col [REDACTED]): Yes, I do.

P (CDR [REDACTED]): Also during the group questioning, the defense counsel mentioned a civil suit initially filed in the State of Washington. Sir, do you agree that unless that civil suit has a bearing on an issue of fact or law, that you are required to deal with as the military commission member that suit does not impact our commission trial here?

CM (Col [REDACTED]): I would agree with that.

P (CDR [REDACTED]): Thank you, sir. Sir, getting back to your questionnaire, Questions 8 and 47, you stated that at one time you were responsible [REDACTED]. Could you elaborate on that, please?

CM (Col [REDACTED]): [REDACTED]

P (CDR [REDACTED]): Where were you physically located when you performed that duty?

CM (Col [REDACTED]): [REDACTED]

P (CDR [REDACTED]): Sir, were you in any way involved in making the determination of what detainees were eligible for transfer to Guantanamo?

CM (Col [REDACTED]): No, I was not.

P (CDR [REDACTED]): [REDACTED]

CM (Col [REDACTED]): [REDACTED]

P (CDR [REDACTED]): [REDACTED]

CM (Col [REDACTED]): [REDACTED]

whatsoever.

PO: I am confused by that answer. Sitting here today, do you have an independent recollection of seeing the name Salim Ahmed Hamdan before?

CM (Col [REDACTED]: No.

PO: Okay.

P (CDR [REDACTED]: Thank you, sir.

PO: [REDACTED]

CM (Col [REDACTED]: [REDACTED]

PO: Thank you.

P (CDR [REDACTED] Colonel [REDACTED] do you understand that just because someone was transported to Guantanamo does not mean that they are guilty of an offense?

CM (Col [REDACTED]: I do.

P (CDR [REDACTED] Sir, in Question 17, you stated that you thought the publicity associated with this case might impact your family. Do you have any specific concerns?

CM (Col [REDACTED] No, that's a general comment.

P (CDR [REDACTED] Will that in any way impact your ability to fairly sit as a member at this trial?

CM (Col [REDACTED] No, it will not.

P (CDR [REDACTED] In Question 19, you indicated that your position [REDACTED] might lead one to believe that you are biased in this matter. I will start simply; do you feel you are biased in this matter?

CM (Col [REDACTED]: No, I do not.

P (CDR [REDACTED] Do you feel you can fairly try this case?

CM (Col [REDACTED] I do.

PO: I am just saying this so it won't look like I am

whispering. Please everyone give a chance for a question to be translated and enough time for a response to be caught so that the translator can translate.

P (CDR [REDACTED]) Thank you, sir. [REDACTED]

Is there anything that you did in that capacity that would interfere with you being a fair and impartial member?

CM (Col [REDACTED]) I don't believe so.

P (CDR [REDACTED]) You also stated on your questionnaire that -- and obviously from your position, you have had briefings concerning the al Qaida and Taliban organizations.

CM (Col [REDACTED]): Yes.

P (CDR [REDACTED]) Do you understand that those briefings are not evidence with respect to this commission.

CM (Col [REDACTED]) I do.

P (CDR [REDACTED]) And do you understand that whatever knowledge you gain from those briefings cannot generally be imparted to your fellow commission members?

CM (Col [REDACTED]): I do.

P (CDR [REDACTED]) Thank you, sir. I have no further questions.

PO: Defense?

DC (LCDR Swift): Yes, sir. Sir, as far as the questions on the law I think I after much stumbling, settled it down to a single question. Do you agree that you can't make up the crime -- that you can't make up the criminal statute after a crime has been committed and punish someone for it?

PO: Do you understand the question, colonel?

CM (Col [REDACTED]) I am going to -- not entirely. I don't understand the question, sir. Say it again.

DC (LCDR Swift): Yes, sir. Do you agree that you cannot -- that you cannot -- that in our jurisprudence system you

cannot write a criminal statute after an action has occurred and punish something that occurred before that criminal statute was established?

CM (Col [REDACTED]) To restate it, do I believe that you cannot fabricate something to cover something that occurred in the past and use that against the accused?

PO: An accused.

CM (Col [REDACTED]) An accused. Is that what you are asking me?

DC (LCDR Swift): When you say fabricate something, I mean create a criminal charge after the fact.

CM (Col [REDACTED]) Yeah.

DC (LCDR Swift): Do you believe you can do that or not?

CM (Col [REDACTED]) It does not make sense to me that you could do that. No, I don't think you could.

DC (LCDR Swift): Thank you. You indicated in your questionnaire [REDACTED] Is that correct, sir?

CM (Col [REDACTED]) That is incorrect.

DC (LCDR Swift): That's incorrect? I'm sorry. Is all of your answers regarding -- I just want to be sure here, sir -- Question 47 unclassified, sir?

CM (Col [REDACTED]) You are asking me is that information classified?

DC (LCDR Swift): Yes, that is exactly what I am asking you, sir.

CM (Col [REDACTED]) Okay. Everything we did [REDACTED]

DC (LCDR Swift): Yes, sir.

PO: So there is no confusion, you are not saying that what you wrote in answer to Question 47 on the paper that your writing is classified, are you?

CM (Col [REDACTED]) No.

PO: Thank you.

DC (LCDR Swift): Well, what I wanted to make sure was that I wasn't going to refer to anything in your writing that was classified. So, sir, certainly if you believe that at the time the question requires you to indicate classified, please let me know and we will stop.

CM (Col [REDACTED]) Let me clarify if I may. The details of what is in this writing is clearly classified.

DC (LCDR Swift): Yes, sir.

PO: Details of what the writing refers to?

CM (Col [REDACTED]) Yes.

PO: Thank you.

DC (LCDR Swift): You said you were involved in putting together a [REDACTED]

CM (Col [REDACTED]) That's correct.

DC (LCDR Swift): Did you simply assemble the list or did you have any evaluation in who should be on the list.

CM (Col [REDACTED]) I assembled the list.

DC (LCDR Swift): And you did not evaluate any of the personnel whether they should or should not be on it?

CM (Col [REDACTED]) No.

DC (LCDR Swift): Did you send other information along with the [REDACTED] area that OSD would evaluate?

CM (Col [REDACTED]) I did not. No, I didn't. Let me elaborate on that if I may.

DC (LCDR Swift): Yes, sir.

CM (Col [REDACTED]) The list when I would get it would come with a series of names. My job was to ensure that it was in the proper format; then I handed that [REDACTED] [REDACTED] [REDACTED] And who then would, I

presume, take that to the commander and the combatant commander and ultimately that would go up through joint staff to OSD for approval.

DC (LCDR Swift): Did you -- were you involved after the preparation of the list with the transportation itself, after such people had been approved. Do you know who had been approved and who had not and make it happen?

CM (Col [REDACTED]) Yes.

DC (LCDR Swift): Were you aware of what the OSD screening criteria were?

CM (Col [REDACTED]) Yes, I was.

DC (LCDR Swift): I presume those are classified; is that correct, sir?

CM (Col [REDACTED]) Yes, they are.

DC (LCDR Swift): We will ask about it in closed session. While you were with [REDACTED]

CM (Col [REDACTED]) [REDACTED]

DC (LCDR Swift): [REDACTED] I am sorry, sir. Where you -- did [REDACTED] utilized in [REDACTED]

CM (Col [REDACTED]) Every day we received [REDACTED] briefings. I was not privileged to any of the information that came out as a result of [REDACTED] And I was not involved in any of the activities that took place at [REDACTED]

DC (LCDR Swift): Were you aware of the agencies that were participating in [REDACTED]

CM (Col [REDACTED]) No. And I only hesitate because I could only speculate who was here. And let me elaborate on that. I do know that we had established a JTF. The components of that JTF and its organization, I was not involved with.

DC (LCDR Swift): You indicated, sir, that you also helped [REDACTED] is that [REDACTED]

correct, sir?

CM (Col [REDACTED]) I was involved primarily in the execution in my role. I was obviously surrounded [REDACTED]

DC (LCDR Swift): Were you aware -- at any time was there any position of discussing ROE or other parts as to whether the Geneva Convention was applicable to [REDACTED]

CM (Col [REDACTED] [REDACTED] [REDACTED])

DC (LCDR Swift): Are those opinions or the discussions of it classified?

CM (Col [REDACTED]) Yes, they are.

DC (LCDR Swift): We will discuss them in cross session, sir.

You have attended the [REDACTED] [REDACTED] sir?

CM (Col [REDACTED]) Yes, I did.

DC (LCDR Swift): You indicated that you received significant amount of training while at the [REDACTED] on terrorism.

CM (Col [REDACTED]) I don't know if I would use the term significant, but it was part of the curriculum. And to put it in perspective, I went to the [REDACTED] prior to my [REDACTED] assignment.

DC (LCDR Swift): Much of it, in other words, has sort of been overcome by events?

CM (Col [REDACTED]) Exactly.

DC (LCDR Swift): Yes, sir. While there, did you read prior to -- while at the [REDACTED] -- any books about al Qaida or Usama bin Laden?

CM (Col [REDACTED]) No.

DC (LCDR Swift): While at the [REDACTED] was it ever discussed in these terrorism classes that the operations that have gone on in the 90's amounted to a war or were actually ongoing conflict?

PO: Thank you, Colonel [REDACTED] You may return to the deliberations room.

How long is it going take -- you all can rise, but I am not going to tell you to rise.

How long is it going to take to have a recess?
Everything being equal, the translators need a break.
Can we have a recess for 15 minutes by any wild chance?
We can do it?

The counsel indicated.

The court is in recess.

The Commission Hearing recessed at 1410, 24 August 2004.

The Commission Hearing was called to order at 1431, 24 August 2004.

PO: Proceedings will come to order. Let the record reflect that all parties present when we left are once again present. Colonel [REDACTED] is in the courtroom. The other members are not present. I am handing Colonel [REDACTED] his individual questionnaire for reference during the voir dire. Trial?

P (CDR [REDACTED]) Thank you, sir. Good afternoon, Colonel [REDACTED]

CM (Col [REDACTED]) Afternoon.

P (CDR [REDACTED]) Sir, getting right to the questionnaire, in Question 15 you indicated that you thought the publicity associated with this case might impact your family. Do you have any specific concerns in that regard?

CM (Col [REDACTED]) No, I don't have any specific concerns. I was a little concerned back in June when my name showed up in the newspaper about being a part of this commission. I was mostly concerned about the affect it would have on my family. However, given the reality that this was going to be in the papers and was going to have high publicity both in the United States and everywhere else, I recognized the fact that all of us in these proceedings are in a similar situation having to do with the publicity and having folks know who you are. Given that, I discussed it with my family and I only have general concerns for their safety; but either way it is

the defense counsel stated to you the sources of law that he felt applied to this commission. He mentioned treaties, statutes, other things. Not getting into both sides of the argument on that issue, I think it was evident that we did not agree with his statement. Do you agree that you are the determiner as a commission member of the law, issues that will happen in this case?

CM (Col [REDACTED]) As I understand the orders that have been given to us on this commission, we will both determine the law and the facts in this case. So yes, the answer is yes.

P (CDR [REDACTED]) Also during that group questioning there was mention of jurisdiction which had been explained to you by the presiding officer. In that discussion the defense counsel stated that there was jurisdiction of law of war violations. Now, we will contend that there is also jurisdiction over crimes triable by military commission in accordance with the orders and instructions. Do you understand that this is potentially a point of issue and that you will receive briefing from counsel on such issues and you will be required to decide it?

CM (Col [REDACTED]) I understand that defense and the prosecution have a difference of opinion as to what laws apply and how they apply, and that will be the commission's job to determine whether the motions that you set forth in front of us are valid or not and we will judge that.

P (CDR [REDACTED]) Yes, sir. Sir, also brought up was a lawsuit brought by defense counsel in civilian court initially in the State of Washington. Do you understand that that is a separate and distinct proceeding, and that unless it impacts a question of law or fact in this proceeding it has no impact on what we are doing here?

CM (Col [REDACTED]) I understand that.

P (CDR [REDACTED]) I just want to clarify one particular phrase you used in filling out your questionnaire on Question 41. When discussing how 9/11 affected you, one of your comments was that we must stand tall. Could you please explain that to us.

CM (Col [REDACTED]) I believe I also wrote and I can refer here that the threat of terrorism, in my opinion, is much like many of the other threats throughout the course of

history of our country we have faced. I won't get into any specifics, but that threat much like the historical threats we have faced must be met with the same resolve as those previous threats to our country and that was my intention when I said we must stand tall.

P (CDR [REDACTED]) When we apply things to the specifics of this particular accused and his right to a fair trial you see nothing in your background to impact your ability to serve on this commission?

CM (Col [REDACTED]) Absolutely none.

P (CDR [REDACTED]) Thank you very much, sir.

DC (LCDR Swift): I have only a few questions, sir.

PO: Pardon?

DC (LCDR Swift): I have only a few questions.

PO: Okay.

DC (LCDR Swift): I know that comes as a surprise, sir.

One -- before I begin, is anything in your questionnaire, just reviewing it again, classified in any way? I know you intended it not to be, but I don't want to refer to something classified.

CM (Col [REDACTED]) There is nothing that I wrote in there that is classified.

DC (LCDR Swift): You were involved with the Predator Missles Program; is that correct, sir.

CM (Col [REDACTED]) Yes. You are making a slight mistake in terminology there. Predator is an unmanned aerial vehicle.

DC (LCDR Swift): Yes, sir.

CM (Col [REDACTED]) The missile you are referring to is the Hell Fire Missile.

DC (LCDR Swift): Yes, sir.

CM (Col [REDACTED]) And, yes, I was involved in this program.

PO: Which program? I am sorry.

CM (Col [REDACTED])

PO: Thank you.

CM (Col [REDACTED])

DC (LCDR Swift): Yes, sir. In the course of doing that did you have any operations or was a [REDACTED] that is a documented fact. Were you in anyway involved in that operation, sir?

CM (Col [REDACTED])

DC (LCDR Swift): I have no other questions at this point.

PO: Thank you. Any other follow?

Sir, could you return to the deliberation room and please ask Colonel [REDACTED] to come in.

CM (Col [REDACTED]) I will.

PO: Thank you. Let the record reflect that Colonel [REDACTED] has left the courtroom and that Lieutenant Colonel [REDACTED] has entered it, and that I have handed him his questionnaire.

Trial?

P (CDR [REDACTED]) Thank you, sir. Good afternoon, Lieutenant Colonel [REDACTED]

CM (LtCol [REDACTED]) Good afternoon.

P (CDR [REDACTED])

CM (LtCol [REDACTED]) That's correct.

P (CDR [REDACTED]) Obviously, I don't want us to get into classified information, but could you generally describe what your role, or what your duties were.

CM (LtCol [REDACTED]) Yes, I am an [REDACTED]
[REDACTED]
[REDACTED]

P (CDR [REDACTED]) Were you ever specifically involved with or provided information concerning the capture of the accused?

CM (LtCol [REDACTED]) No, I was not.

P (CDR [REDACTED]) Do you have any knowledge concerning the circumstances of the accused's capture?

CM (LtCol [REDACTED]) No, I do not.

P (CDR [REDACTED]) Do you have any information concerning his detention after being captured?

CM (LtCol [REDACTED]) No, I do not.

P (CDR [REDACTED]) Now, as an intelligence officer have you ever received specialized training on the al Qaida organization or the Taliban?

CM (LtCol [REDACTED]) Specialized training, no I have not.

P (CDR [REDACTED]) Is there anything involved in training you received or your exposure as an intelligence officer that you feel would impact your ability to fairly try this case?

CM (LtCol [REDACTED]) No, there is not.

P (CDR [REDACTED]) Just want to touch on a couple of things raised when the entire group was being questioned. During defense counsel's questioning he stated what he felt the sources of law were applicable to this case. It was probably evident that the prosecution did not feel the same way on that issue. Do you understand that as a commission member it is for you to determine what the applicable law is with respect to this case?

CM (LtCol [REDACTED]) Yes, I do.

P (CDR [REDACTED]) Also in the defense counsel's questioning there was discussion of jurisdiction and the presiding officer assisted in defining what jurisdiction was. The defense counsel mentioned violations of the law of war in order to determine jurisdiction, and have jurisdiction, where the prosecution would also contend that offenses triable by military commission also generate jurisdiction. This is obviously a tough time for those terms but the point I am getting at is do you understand that you will get briefed on those issues by both sides and you will have to make a determination?

CM (LtCol [REDACTED]) Yes, I do.

P (CDR [REDACTED]) Also mentioned during the group questioning was defense counsel filing a lawsuit at least then in the State of Washington.

Do you understand that that lawsuit is separate and distinct from this commission?

CM (LtCol [REDACTED]) Yes, I do.

P (CDR [REDACTED]) And do you understand that unless a question of fact or a law question comes up in this commission that makes that lawsuit relevant these are two separate entities, if you will?

CM (LtCol [REDACTED]) Yes, I do.

P (CDR [REDACTED]) Thank you, very much.

PO: Commander Swift?

DC (LCDR Swift): Yes, sir. Good afternoon, Colonel.

CM (LtCol [REDACTED]) Good afternoon.

DC (LCDR Swift): Let me begin with the same warning, or caveat, that Colonel [REDACTED] used, please in my questions if I even tread towards classified information alert me.

Were you ever physically located in [REDACTED] in these duties?

CM (LtCol [REDACTED]) Yes, I was.

DC (LCDR Swift): During what periods of time?

CM (LtCol [REDACTED]) Multiple times between the middle of [REDACTED]

DC (LCDR Swift): And you worked with which organizations?

CM (LtCol [REDACTED]) [REDACTED]

DC (LCDR Swift): What was your role inside that task force?

CM (LtCol [REDACTED]) [REDACTED]

DC (LCDR Swift): Were you one of the officers or the officer in charge?

CM (LtCol [REDACTED]) I was -- when we went forward?

DC (LCDR Swift): Yes.

CM (LtCol [REDACTED]) [REDACTED]

DC (LCDR Swift): [REDACTED] Will it require you to go into classified information to talk about who you provided intelligence to?

CM (LtCol [REDACTED]) Yes, it would.

DC (LCDR Swift): We will save that. In order to provide this intelligence -- well, will it require you to go into classified information to tell me any of the sources of the [REDACTED] you used?

CM (LtCol [REDACTED]) Yes.

DC (LCDR Swift): You stated earlier that you do not know or did not know Salim Ahmed Hamdan?

CM (LtCol [REDACTED]) [REDACTED]

DC (LCDR Swift): In your experience there were people who were being referred to by their full names who were being detained?

CM (LtCol [REDACTED]) Yes, yes, sir, they were.

DC (LCDR Swift): Were all those names correct at the time that they were being referred to?

CM (LtCol [REDACTED]): To the best of my knowledge.

DC (LCDR Swift): [REDACTED]
[REDACTED]

CM (LtCol [REDACTED]): Yes, it is possible.

DC (LCDR Swift): Probably, again, to get into more of the type of [REDACTED]
[REDACTED]

CM (LtCol [REDACTED]): That's correct?

DC (LCDR Swift): Yes, sir. As an [REDACTED] officer are you more likely to put stock in an [REDACTED] report having experience in how they are developed?

CM (LtCol [REDACTED]): As opposed to?

DC (LCDR Swift): As opposed to other evidence?

CM (LtCol [REDACTED]): I would weigh the evidence that is put before me. If you are saying the intelligence would be the evidence?

DC (LCDR Swift): Did you believe that the [REDACTED] that you were obtaining in [REDACTED] was accurate?

CM (LtCol [REDACTED]): At times yes, at times not.

DC (LCDR Swift): To be more specific, does it require you to go into classified information?

CM (LtCol [REDACTED]): I am not sure. It will depend on the question itself.

DC (LCDR Swift): Okay. I will try another couple then. When you say at times not, can you elaborate on those occasions when it wasn't accurate?

CM (LtCol [REDACTED]): It might be best if we just do that in closed session.

DC (LCDR Swift): Yes, sir. You indicated that you did self-study

on al Qaida, can you describe that?

CM (LtCol [REDACTED]) As an [REDACTED] officer of course we are reviewing the information that is coming in, the [REDACTED] reports, and that's what I refer to as self-study.

DC (LCDR Swift): So you are basing that primarily on the intelligence reports that you received?

CM (LtCol [REDACTED]) Correct.

DC (LCDR Swift): You didn't do additional study by reading books?

CM (LtCol [REDACTED]) Yes.

DC (LCDR Swift): Is that the same as Taliban and Islamic fundamentalism?

CM (LtCol [REDACTED]) Correct.

DC (LCDR Swift): You indicated that you've seen some media coverage on military commission proceedings. Can you elaborate?

CM (LtCol [REDACTED]) Just that they were forming the commissions in Guantanamo Bay and it would be the first time since World War II.

DC (LCDR Swift): Do you remember where you received that from?

CM (LtCol [REDACTED]) CNN and Fox most likely.

DC (LCDR Swift): As an [REDACTED] officer when you prepared briefs -- and you prepared briefs for use by [REDACTED] is that correct, sir?

CM (LtCol [REDACTED]) Yes, I have.

DC (LCDR Swift): You have during your career?

CM (LtCol [REDACTED]) Yes.

DC (LCDR Swift): You are required to put faith in the sources and material that's being provided to you; is that correct, sir?

CM (LtCol [REDACTED]) That's correct -- well, and you have to weigh

the evidence.

DC (LCDR Swift): Are you more -- because of your experience is it fair to say that you are more inclined toward believing an [REDACTED] that's been put together by a competent intelligence officer?

CM (LtCol [REDACTED]) Just depends on the information.

DC (LCDR Swift): In addition to your tour in [REDACTED] have you had any other support or operational roles in [REDACTED]

CM (LtCol [REDACTED]) [REDACTED]

DC (LCDR Swift): Were you -- without again -- if it requires us go into classified let me know. What exactly did you do as that liaison officer?

CM (LtCol [REDACTED]) We would have to discuss that elsewhere.

DC (LCDR Swift): Classified information, okay.

The rest of my questions are going to go into the same area and we will need to do this in closed session.

P (CDR [REDACTED]) Nothing additional, sir.

PO: Sir, would you please return to the deliberation room and ask Colonel [REDACTED] to come in.

Let the record reflect that Colonel [REDACTED] has entered the courtroom and Colonel [REDACTED] has left the courtroom. I have provided Colonel [REDACTED] with a copy of his questionnaire. Trial?

P (CDR [REDACTED]) Thank you, sir. Good afternoon, Lieutenant Colonel [REDACTED]

CM (LtCol [REDACTED]) Good afternoon.

P (CDR [REDACTED]) I would like to address your questionnaire. Particularly, I want to focus on Questions 15 through 18. You expressed concern about the safety for your family as a result of your service on this commission. Are there any specific concerns that you have?

CM (LtCol [REDACTED]) No, there are no specifics. It is all generalized comments about the concern and safety of my family.

P (CDR [REDACTED]) Do you feel that you can, as hard as it may be, put aside those concerns and give this commission your undivided attention and provide the fair trial if called upon to do so?

CM (LtCol [REDACTED]) If called upon to do so, yes, sir, I can.

P (CDR [REDACTED]) And for purposes of my questioning, I understand you are an alternate at this point, but I will couch my questions as if you are selected to sit.

CM (LtCol [REDACTED]) Understood.

P (CDR [REDACTED]) As a voting member, you put in your questionnaire that the events of 9/11 in general aroused strong emotions as they have in most Americans. Do any of those emotions impact your ability to judge this particular accused?

CM (LtCol [REDACTED]) No, sir, they do not.

P (CDR [REDACTED]) Would you agree that any emotional response should not sway your judgment in assessing the facts and law in this case?

CM (LtCol [REDACTED]) Very much so, sir, they must stay out.

P (CDR [REDACTED]) On your questionnaire you put that, as of right now, you don't feel influenced by the high media interest in this case, but that possibly you might. Could you explain to us what you foresee might occur in the future?

CM (LtCol [REDACTED]) What I believe is that possibly if it comes very high media and attention that they will find out that where I live, things like that. And the press will be bothering my family, my myself when we are not in these proceedings and that is how I see the media could possibly affect me.

P (CDR [REDACTED]) Will you be able to set aside that concern and conduct business and provide a fair trial while in this courtroom?

CM (LtCol [REDACTED]) Yes, sir, I can.

P (CDR [REDACTED]) You also put in your questionnaire that you desire to seek justice for those who have perished at the hands of terrorists.

CM (LtCol [REDACTED]) That is part of the emotional response that I had. That probably goes with how I feel, strong emotionally towards this case. Understanding that what I said in my prior answer that I will take the emotion out of that, but I want to be forthright in my questionnaire in how I responded.

P (CDR [REDACTED]) And in seeking justice, do you understand that involved in seeking justice is ensuring a fair trial and holding us to our obligation to prove this case beyond a reasonable doubt?

CM (LtCol [REDACTED]) That is exactly part of my answer, sir. I think that it is on both sides that this must have an end state at some point in time and I think justice has to be served for all individuals involved.

P (CDR [REDACTED]) On your questionnaire in Question 45, you indicated you have read media reports about conditions of detention in Afghanistan and Guantanamo. Roughly, how many articles have you seen on this subject?

CM (LtCol [REDACTED]) I would probably say two to three, sir.

P (CDR [REDACTED]) Did you come across them just as the normal reading of the paper or watching TV or did you specifically seek them out?

CM (LtCol [REDACTED]) No, I came across them just by strictly accident, sir.

P (CDR [REDACTED]) Have you ever personally visited any of the detention facilities in Afghanistan or here at GTMO?

CM (LtCol [REDACTED]) No, sir, I have not.

P (CDR [REDACTED]) Do you have any way as you sit here right now to judge the accuracy of these articles that you may have read?

CM (LtCol [REDACTED]) No. I have no basis for the judge of those articles, sir.

P (CDR [REDACTED]) And you understand that your basis to judge these type of items is based on what you will see presented before this commission?

CM (LtCol [REDACTED]) That is correct, I understand that.

PO: Could counsel and Colonel [REDACTED] please let a little time elapse between questions and answers, please?

P (CDR [REDACTED]) Yes, sir. In looking at Question 47, you say that at least at some point you express an opinion that at least some detainees at Guantanamo Bay are terrorists. Do you recall when or the context of expressing that opinion?

CM (LtCol [REDACTED]) No, I do not recall the premise of that. I think the most influential piece I saw was from 20/20, but I may not be right about that.

P (CDR [REDACTED]) Is that what the opinion was based on a 20/20 --

CM (LtCol [REDACTED]) Yes, and that opinion at the time.

P (CDR [REDACTED]) When you made that statement were you referring to any particular detainee?

CM (LtCol [REDACTED]) No, sir. That was just a general statement.

P (CDR [REDACTED]) So that had nothing to do with the status of this particular accused?

CM (LtCol [REDACTED]) No, sir.

P (CDR [REDACTED]) No further questions, sir.

DC (LCDR Swift): I must confess, Colonel, on Question 18 I really didn't understand your answer. So, I am going to ask the question again. Do you believe that your participation in these proceedings will have any effect on you? Any affect on how you are viewed or perceived either in your personal or professional life?

CM (LtCol [REDACTED]) What that means is if -- I will try to slow down some.

DC (LCDR Swift): Thank you, sir.

CM (LtCol [REDACTED]) What I meant by that is it comes out as a

negative reaction in the United States, knowing that I was part of these commissions. I may be perceived negatively also based on the way the question was worded to me at the time.

DC (LCDR Swift): Let get more specific then. What would a negative reaction be in the United States? Can use -- is that to a finding of not guilty, a negative, or angry reaction or to the proceedings themselves?

CM (LtCol [REDACTED]) To the proceedings themselves, more in general to me.

DC (LCDR Swift): Are you concerned at all professionally about how being a member of this panel can affect you?

CM (LtCol [REDACTED]) No, sir, I do not.

DC (LCDR Swift): In Question 41, you did answer to the events of 9/11 has made you very angry. And it is important that we be forthright and I certainly understand that you will do your absolute best to divorce emotion, but you do have strong emotions, don't you?

CM (LtCol [REDACTED]) Yes, I do have strong emotions, sir.

DC (LCDR Swift): You indicated that you knew you had professional friends in the Pentagon and you wrote down two names and I don't think it is relevant to put their names down. Were they killed, injured, or were just there?

CM (LtCol [REDACTED]) They were just there, sir.

DC (LCDR Swift): Did you talk to them about what happened?

CM (LtCol [REDACTED]) No, I had never talked to either one of those about that.

DC (LCDR Swift): You indicated in Question 42 that you believed that if your identity or membership in this commission is exposed or broadcast to the public that you believe that they will seek me out, seek me and my family out for revenge. First of all, who is they?

CM (LtCol [REDACTED]) Terrorist organizations, sir.

DC (LCDR Swift): Do you believe they will do that whether you find Mr. Hamdan guilty or not guilty. Does it matter

what you find if you participate?

CM (LtCol [REDACTED]) I think my participation alone would be the reason, sir.

DC (LCDR Swift): Is this a strong feeling or -- well you stated it as a strong feeling. Do you still stand by that?

CM (LtCol [REDACTED]) Yes, it is a strong apprehension to better describe it for you, sir.

DC (LCDR Swift): You indicated on Question 44 that you have done self-study regarding al Qaida on the Internet. Can you briefly describe what sites you have gone to and how much time you have spent on them.

CM (LtCol [REDACTED]) Numerous sites I have gone to, whatever I could find on the search. *The Class of Civilizations* was probably the best book I have read. I just wanted to understand.

PO: I state for the record, once again, that when I make motions towards counsel or a member I am not doing anything other than trying to keep them to speak slowly so that the translators can translate. I apologize for interrupting.

CM (LtCol [REDACTED]) I'm sorry. I'll slow down. Sir, to get back to your question I want to understand both sides how Islamic, also United States, also the Taliban what their values were, what they wanted, their goals, things like this. I wanted an understanding. I think I can better my life, know the reasons of the things that have happened.

DC (LCDR Swift): How much time did you spend on that?

CM (LtCol [REDACTED]) That is difficult to say. I wouldn't say I was obsessed, but I have probably spent probably a month's of research.

DC (LCDR Swift): A month?

CM (LtCol [REDACTED]) Yes. And that's over four to five years.

DC (LCDR Swift): Over four to five years. So you began this study before 9/11?

CM (LtCol [REDACTED]): No, sir. Only the book *Class of Civilizations* was before.

DC (LCDR Swift): In Islamic fundamentalism you indicated self-study, but you also indicated S-2 briefings, were those classified?

CM (LtCol [REDACTED]): Yes, sir, they were.

DC (LCDR Swift): Then we will discuss those briefings in closed session.

CM (LtCol [REDACTED]): Yes, sir.

DC (LCDR Swift): You also indicated that you had seen news media on the military commissions. Do you recall what the sources of that media was? Was it paper or was it television broadcasts?

CM (LtCol [REDACTED]): It was on the internet. Every morning I would check the internet and it would say the military commissions were forming and that is all I saw on that.

DC (LCDR Swift): Do you -- well the Department of Defense has several websites, do you use them?

CM (LtCol [REDACTED]): No, sir, I did not.

DC (LCDR Swift): They also have the early bird. Is that where you saw these?

CM (LtCol [REDACTED]): Yes, sir, that is where I saw those.

DC (LCDR Swift): And so did you go ahead and click on the article and read the entire article or just read the banner so to speak?

CM (LtCol [REDACTED]): I would click on the article. I probably would read a few lines that interest me in the beginning and then delete it. I think there was only one article that I ever read.

DC (LCDR Swift): Now, you realize that you met me at the time that you filled this questionnaire out. Do you recall whether I happened to be in that article? I was in several.

CM (LtCol [REDACTED]): No, I do not remember your name until today,

sir.

DC (LCDR Swift): Now, on your opinion in 47 you indicated that, yes, you believed that the persons in Guantanamo Bay were terrorists; is that correct?

CM (LtCol [REDACTED]) At one time, yes, because it asked if I ever expressed an opinion.

DC (LCDR Swift): But you don't recall who you expressed it to?

CM (LtCol [REDACTED]) No, I do not, sir. And like I said before, sir, it was a very general statement and a general conversation.

DC (LCDR Swift): Then you answered B and said that detainees at Guantanamo are guilty of any criminal offense and you answered that, no.

CM (LtCol [REDACTED]) Right. As we go to the underlying question, have I ever expressed an opinion and it is like when I got to whether the detainee was guilty of any criminal charges, what I was trying to say is I don't know. So I said no. I didn't express the opinion either way.

DC (LCDR Swift): I understand. You don't associate then a terrorist and a criminal?

CM (LtCol [REDACTED]) That's what I am saying, sir.

DC (LCDR Swift): So you saw those to be two separate things?

CM (LtCol [REDACTED]) That's correct. I take the word guilty as a due process, sir, someone who would have to go through a due process and then a determination of guilty or not guilty, sir.

DC (LCDR Swift): Was the 20/20 special that you watched critical of Guantanamo Bay or generally supportive of it; or was it simply information?

CM (LtCol [REDACTED]) It was more information.

DC (LCDR Swift): How did you feel when you watched it?

CM (LtCol [REDACTED]) How did I feel? I feel that -- I felt it was -- it is like it has been a long time. That's what I remember, it has been a long time that they have been

down here and so when is this due process going to happen. I remember that.

DC (LCDR Swift): You answered 52, which basically was you believed members of the United States are obligated to abide by the Geneva Convention during armed conflict. You indicated that you're not sure about that.

CM (LtCol [REDACTED]) It was a question at the time that I was not sure about, at least not quite sure.

DC (LCDR Swift): Okay. Do you know what the Geneva Convention is then?

CM (LtCol [REDACTED]) Not specifically, no. That's being honest and I wanted to review it before I could formulate an opinion before that question, sir. What I was trying to do was, I know it is very specific and there is three different articles, I wanted to put not sure because I couldn't specifically say yes and formulate an opinion and give a full answer to that question.

DC (LCDR Swift): Actually there are four articles, sir, but that's fine. Is it fair to say that you would be willing to listen to both counsel's arguments regarding its application to these proceedings?

CM (LtCol [REDACTED]) Yes, sir.

DC (LCDR Swift): I don't have any further questions.

PO: Trial?

DC (LCDR Swift): In open session, sir.

P (CDR [REDACTED]) Nothing further, sir.

PO: Thank you, Colonel [REDACTED] If you will return to the deliberation room.

CM (LtCol [REDACTED]) Yes, sir.

PO: Let the record reflect that Colonel [REDACTED] has left the deliberation room. Okay, who do you want back for classified, trial? Closed, excuse me -- I apologize, for closed. No one?

P (CDR [REDACTED]) No one, sir.

PO: Okay.

DC (LCDR Swift): I need a moment to consult.

PO: That's fine.

DC (LCDR Swift): In reviewing my notes, I believe all of the members indicated at least one area that required classified information, sir.

PO: Realizing that I can't hold you to this and you can't -- it is hard for you. How long do you think your combined questioning will take? I mean seriously, thirty minutes?

DC (LCDR Swift): I doubt that seriously, sir.

PO: An hour?

DC (LCDR Swift): For each one or --

PO: No, for all five of them.

DC (LCDR Swift): For all five of them, sir?

PO: Yeah?

DC (LCDR Swift): Given two of the members had [REDACTED]

[REDACTED]
[REDACTED] I have no way of knowing because of course I haven't been provided any classified information regarding that. So it is impossible to estimate, sir. The rest of them, they are going to be fairly short. Those -- but specifically Colonel --

PO: Okay. That's all right.

DC (LCDR Swift): Colonel [REDACTED] and --

PO: For those who are interested, I do not anticipate holding the next open session until 1730.

DC (LCDR Swift): Yes, sir. I would like to enter argument and make a request regarding whether my client will be present. I understand the rest of the public will not, but I would like to talk about my client being present for the next session.

PO: Okay. Go on?

DC (LCDR Swift): I understand under the security policy that one must go to the originating authority to classify the material to determine whether it be released to my client. I request that a summation be prepared of each of these persons where they believe they are going to talk and that we go to such a classifying authority to see if my client will be present. Nothing is more fundamental in my client's faith in the process -- in fact faith in the process that believes that he has full and fair members who are able to hear his case without any other prejudice to exclude him at that point without even trying to include him is not in keeping with the full and fair trial as dictated by the President, sir.

P (CDR [REDACTED]) Yes, sir. Lieutenant Commander Swift himself had said repeatedly he is going to get into classified information. This is a nondiscretionary call. We are going to talk about classified information and the accused does not have the clearance to be exposed to that information. Now, it is true that potentially when we are done this information can be reviewed and summaries, redacted portions can be provided; but as of right now to ask someone to make a call that we can expose the accused to this information without knowing what the information is, that's just not feasible, sir.

PO: Your request is denied, Commander Swift. How long is that going to take you to be ready to start the closed session, clear the courtroom, and do the things?

P (CDR [REDACTED]) Twenty minutes, sir.

PO: We will start at 1535. The court is in recess.

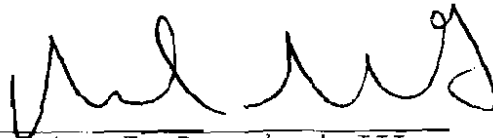
The Commission Hearing recessed at 1524, 24 August 2004.

AUTHENTICATION OF COMMISSIONS PROCEEDINGS

in the case of

United States v. SALIM AHMED HAMDAN
a/k/a Salim Ahmad Hamdan
a/k/a Salem Ahmed Salem Hamdan
a/k/a Saqr al Jadawy
a/k/a Saqr al Jaddawi
a/k/a Khalid bin Abdallah
a/k/a Khalid wl'd Abdallah

This is to certify that Pages 1 through 83 are an accurate
and verbatim transcript of the foregoing proceedings.



Peter E. Brownback III
Colonel, U.S. Army
Presiding Officer

26 AUGUST 2006
Date

THE NEXT SESSION WAS A CLOSED SESSION AND SEALED WITH A
CLASSIFICATION OF **S E C R E T**. THIS SESSION CONSISTS OF PAGES 84
TO 110 AND CONTAINS THE INDIVIDUAL VOIR DIRE OF COMMISSION
MEMBERS: COLONEL [REDACTED] COLONEL [REDACTED] LIEUTENANT COLONEL
[REDACTED] AND LIEUTENANT COLONEL [REDACTED]

AUTHENTICATION OF COMMISSIONS PROCEEDINGS

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a/k/a Khalid bin Abdallah
a/k/a Khalid wl'd Abdallah

This is to certify that Pages 84 through 112 are an accurate
and verbatim transcript of the foregoing proceedings.



Peter E. Brownback III
Colonel, U.S. Army
Presiding Officer

26 AUGUST 2004
Date

The Commission Hearing opened at 1733, 24 August 2004.

PO: Be seated. Let the record reflect that all parties present when the court recessed are again present. The members other than myself are not present. The proceedings from the time I walked in are no longer under seal.

During the closed the session, I received challenges for cause. One against Colonel [REDACTED]
[REDACTED]
[REDACTED]

P (CDR [REDACTED]) Yes, sir.

PO: Defense?

DC (LCDR Swift): That's correct, sir.

PO: I received a second -- another challenge for cause against Lieutenant Colonel [REDACTED]
[REDACTED]
is that correct?

P (CDR [REDACTED]) Yes, sir.

DC (LCDR Swift): Yes, sir.

PO: Okay. Trial, challenges?

P (CDR [REDACTED]) We have no challenges, sir.

PO: Okay. Defense?

DC (LCDR Swift): We have four challenges, sir.

PO: Okay.

CC: I am going to start based on the open session challenges, Colonel [REDACTED] and Colonel [REDACTED]

PO: Okay. The only challenges -- I have already covered all the closed session challenges.

DC (LCDR Swift): Yes, sir.

PO: Okay. Good.

DC (LCDR Swift): Colonel [REDACTED] as you just indicated, I previously entered a challenge regarding the information in the closed session. In the open session I'd like to challenge Colonel [REDACTED] based on good cause on appearance, that is Military Commission Instruction Number 8 permits the removal of members for good cause. Good cause can be the members inability to sit, that we discussed earlier, and the appearance of unfairness of a member's ability to sit.

It's the defense's position that Colonel [REDACTED] placed on this panel as a person who supervised detainee

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] and it does not give confidence to the public at large that this proceeding will be fair.

Likewise, Lieutenant Colonel [REDACTED] plays an

[REDACTED]
[REDACTED] It does not give the appearance of fairness for the proceedings. Again, that constitutes good cause shown. It's important that these proceedings not only be fair but they appear fair to the world, and the continuation of both of these members does not meet that test.

As to Colonel [REDACTED] Colonel [REDACTED] -- we also challenge Colonel [REDACTED] Colonel [REDACTED] visited the Trade Center two weeks after the attack. Records document the state that it was in. Persons that he had in command responsibility were involved in the rescue effort and were -- he went to the funeral. If we move to sentencing -- that is an important, if -- we fully expect the prosecution to put on evidence of the impact on victims. That impact will be particular for Colonel [REDACTED] because he has personal experience with those victims. It won't be a detached evaluation for him. It will be the memories of 9/11. It will be memories of the funeral that he attended. While I am sure that he intends good intent to keep an open mind, to try and consider all ranges, this experience makes him

unsuitable for this panel.

Finally, we challenge Lieutenant Colonel [REDACTED] Lieutenant Colonel [REDACTED] very candidly said that he has very strong emotions, that he is very angry. He did say that he understood that he should accept those emotions, but when asked again he said, yes, I have very strong emotions. Also, Colonel [REDACTED] has indicated that he has a real and present apprehension that he will be harmed, or his family will be harmed by his participation. He certainly said, I know my duty. I'm a soldier, I should do my duty. But with that type of apprehension sitting, with his very strong feelings, both in the merits and at sentencing, he's not an appropriate person to sit on this panel. And, again, we believe that good cause exists for his removal based on his strong personal beliefs, and a real apprehension, not a speculative one, a real apprehension that he has in his participation.

Thank you. Well, I'll address it at the end of it. I am sure that Commander [REDACTED] has rebuttal.

PO: Go on, Commander [REDACTED]

P (CDR [REDACTED] Thank you, sir. Sir, the prosecution will address these in order of rank and seniority. We will begin with Colonel [REDACTED]

It appears the only issue the defense has with Colonel [REDACTED] is his interaction with a [REDACTED] A reality of military life, a reality of being a Marine is that in the course of his 28 years, he has known of his fellow Marines to pass away. He told us all that this is something he is accustomed to, that he may not get used to it, but that he is treating this death no different than the deaths of those other [REDACTED] who have perished. He stated he has no individual knowledge of this accused. He stated that he will judge this case based on the evidence presented in this courtroom. We oppose the defense's challenge for cause.

With respect to Colonel [REDACTED] Colonel [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Those decisions were made elsewhere, and he was not in a position to question those decisions. In his limited capacity of being a [REDACTED] he had no knowledge of this accused; he had no knowledge of this accused's transfer; he had no knowledge of the facts surrounding this accused's capture. Once this accused arrives at Guantanamo, [REDACTED] He has no interaction with what is going on in Guantanamo. While he knows that a joint task force is established in Guantanamo, he is not even aware of the units that make up that joint task force. We oppose the defense challenge to Colonel [REDACTED]

With respect to Lieutenant Colonel [REDACTED] while he was [REDACTED] he has no knowledge of this accused, he has no knowledge of how he was captured, and he has agreed to judge this case based on the evidence that's been presented. There's simply no basis to challenge Lieutenant Colonel [REDACTED]

With respect to Lieutenant Colonel [REDACTED] he was obviously deeply impacted by the events of 9/11, as many Americans were. This is not necessarily an unreasonable reaction to what occurred that would require his disqualification.

Thank you, sir.

DC (LCDR Swift): To address, briefly, in counter, Commander [REDACTED] did not address in either of his arguments what I addressed here, and that is the appearance. Nothing that he said took away any of the appearance of any military tribunal -- especially both forms of justice are concerned both when -- are they administering justice and does it appear that they are administering -- appear that they are meting out, administering justice.

At a military commission one has to be particularly careful that what you're meting out is not victor's justice. By placing an intelligence officer, by placing a person who was in charge of the detainees, by placing a person who had close relationship with a victim, who went to the funeral, went to the site, and placing someone who to this day says that he is very angry and has a real apprehension on this panel, we appear to be meting out victor's justice. Thank you, sir.

PO: Okay. Yes, go on.

DC (LCDR Swift): I would also like to be heard on the question of abeyance after you've --

PO: Okay. I've considered your challenges, and I am going to forward a transcript of the voir dire, the members questionnaires for Colonels [REDACTED] -- [REDACTED] Lieutenant Colonel [REDACTED] and Lieutenant Colonel [REDACTED] to Mr. Altenburg, the appointing authority, for his action. I offer counsel for both sides, since you're apparently using a different standard for challenge, referring perhaps to the military justice standard under RCM 912(N), an opportunity to send up with that matter any other matters you want; specifically, if you wish to focus on what the standard for challenge should be. Today is the whatever it is -- the 24th. By Tuesday, the 7th, provide opposing counsel anything you want to send so they can comment on it and then get it to me by -- would the 10th give you enough time?

P (CDR [REDACTED]) Yes, sir.

DC (LCDR Swift): Yes, sir.

PO: Give it to me by the 10th and I will -- we got to get the record transcribed and all that anyway. I will get it to Mr. Altenburg to see what he wants to do.

Okay. Now, I have the authority to either abate or not abate, and you want to be heard, Commander Swift?

DC (LCDR Swift): Yes, I do, sir. Sir, I've entered challenges for cause on five members at this point, including yourself. It's our position that to go further with motions with so many challenges where an alternate could not even sit in, if more than two are granted, that we would need to bring in more members.

PO: If more than two are granted? If three are granted.

DC (LCDR Swift): Yes, sir.

PO: If three are granted we have three members left; right?

DC (LCDR Swift): Yes, sir.

PO: That is all we need; right?

DC (LCDR Swift): Yes, sir. Excuse me, if four of those --

PO: Okay. We've got five challenges, and you want an 80 percent success rate?

DC (LCDR Swift): Well, in this sense, and I would point out, sir, what you're saying is that in the consideration of this, in the consideration of the motions, you're going to have necessary discussion by members, and input, notes, hearing all of that will involve persons who may not be here when all of the challenges are done again. Gestured that we have another motion to date following the continuance, that we go through arraignment at this point and enter pleas, but that motions be deferred after that point when we have an answer on these continuances -- or, excuse me, on these challenges.

P (CDR [REDACTED]) Sir, first off, to state the obvious, we do not believe that the defense will be successful in their challenges. Even if they meet a moderate amount of success, it will not impact our ability to have a quorum and go forward. Even if they had the potential success that they may be banking on, there are mechanisms within the system to take care of that if so required. Other new members can be brought up to speed, and that's in our system.

PO: Okay. My question though is, what does it hurt you? Okay. Before we get to the question of abeyance, which I'm sure you'll bring me back to, we've got some matters involving notices of motion, and we only have two motions that either side is ready to talk about anyway; right?

P (CDR [REDACTED]) We have two motions, well actually, three, sir. One brought by the prosecution.

PO: Protective order?

P (CDR [REDACTED]) Yes, sir.

PO: Okay. That is in chambers.

DC (LCDR Swift): I see that as off line, sir.

PO: Well it's not off line.

DC (LCDR Swift): In chambers.

PO: Okay. What I'm asking you is, what does it hurt you -- meaning the government -- if you've already done all the work? And I can look at Captain [REDACTED] and he's ready to stand up and argue right now. So what does it hurt you if I say fine, we'll wait and see whether these challenges are granted or not. Do you lose anything by not having those two motions heard tonight?

P (CDR [REDACTED]) Is it imperative that those two motions get heard tonight?

PO: Do you lose something, Commander [REDACTED]

P (CDR [REDACTED]) Just from a practical standpoint, we lose logistics. It may be difficult to get us together as a group again, and we don't know the timing. I also don't know what timing you're proposing for when we can get together again. I don't know the individual members' schedules. If you're telling me that it's two months down the line before we are able to regroup, then I would say the entire system is prejudiced because that's -- we need to keep this moving forward.

We have a December 11th trial date proposed by the defense that we've agreed to. If we're going to keep that schedule, then we need to begin resolving the issues that we can. Sir, what it comes down to is a determination by you in making this decision as to whether you think that there is a reasonable probability that we're going to drop below quorum. Our position is, actually, that is just not there. We don't think that is a reliable process.

PO: Okay. Let me ask you, Commander Swift: You have two motions?

DC (LCDR Swift): Yes, sir.

PO: Do those motions have any evidentiary matters attached thereto that the members have to hear evidence on? I haven't heard any notice of witnesses or anything for tonight.

DC (LCDR Swift): For tonight, no, sir.

PO: Well, you've got two motions.

DC (LCDR Swift): Yes, sir.

PO: Do you have to have evidence for those?

DC (LCDR Swift): No, I don't believe so, sir.

PO: No, this is a --

DC (LCDR Swift): May I have a moment, sir?

PO: Yeah.

DC (LCDR Swift): No, we don't need that.

PO: You're telling me that you will not need any evidence for these motions, period?

DC (LCDR Swift): Beyond what's already been furnished as attachments, sir.

PO: Okay. Thank you.

DC (LCDR Swift): Sir, I'd like to address Commander [REDACTED] logistics issue.

PO: Okay.

DC (LCDR Swift): Yes, sir. We also have noticed seven other motions that have to be developed and argued. Obviously we're all going to have to get back together again. I would have no objection during the continuance to furnish to the motion to all of the members, to allow them to read it, to have that period of time when they get back, and some of them may well become over the status review area. It is quite possible they might have one, although in the meantime he is scheduled for 3 December, it could be moved up. I don't know. That would change our posture at this point.

PO: Thank you, Commander Swift.

DC (LCDR Swift): So what I would --

PO: Thank you, Commander Swift.

P (CDR [REDACTED]) Sir, the only other issue I would bring up is since Commander Swift brought up his notice of motions, some of those notice of motions are his own motions for a speedy trial. So when you ask if there's anything that impacts us, that prejudices us, the defense has said

that they want a speedy trial, so it seems tough to coordinate those two items.

PO: There's never been a requirement that an attorney argue only one of 63 points of view, and I'm not being sarcastic, that is the way it goes. I believe that this is now a matter of record that he wants a continuance, and that can obviously be brought to whoever is going to make a decision, if a decision is going to be made. You're requesting a continuance on those motions solely; right? That's it?

DC (LCDR Swift): Yes, sir. On those motions, yes, sir.

PO: Okay. Well, there's a difference -- there's a difference between proceeding -- holding the proceedings in abeyance and the continuance. You're requesting a continuance on those motions?

DC (LCDR Swift): Yes, sir.

PO: Thank you. Okay. Please call the members.

The members entered the hearing room.

PO: Please be seated. The commission will come to order. Let the record reflect that all members are present and all other parties present are still in the courtroom.

Members, I have received challenges for cause against various members. I am going to forward the transcript of the challenges of the voir dire, each member's questionnaire, which includes mine, the challenges made by counsel, the opposition by opposing counsel, and the various talk that went on about it to the appointing authority for his decision under MCI. I am not going to hold the proceedings in abeyance. In other words, we're going to continue on; however, we are going to get to a point where we have a continuance. Any question on what I just said?

Apparently not.

Okay. Members, I'm now going to give you some instructions on the procedures we're going to be using. Each of you received earlier some preliminary administrative-type instructions which are now being marked as the next review exhibit in order, 10. If you

think there is a conflict between the instructions that you got previously, and the ones I'm about to give you, the ones you get now control.

Either side have any objection to the instructions -- the preliminary ones that have just been marked?

P (CDR [REDACTED]) No, sir.

DC (LCDR Swift): No, sir.

PO: I have been appointed as the presiding officer. On the 24th -- on the 23rd you were given the President's military order, the military commission orders, DoD Directive 5105.7, and Military Commission Instructions, except instruction Number 8. Those references will apply to all cases in which you may be a commission member. In the references in establishing the commission, the presiding officer is charged with certain duties. Among these is that I will preside over the commission proceedings during open and closed sessions. As I am the only lawyer appointed to the commission, I will instruct and advise you on the law. However, the President has directed that the commission will decide all questions of law and fact. So you are not bound to accept the law as given to you by me. You are free to accept the law as argued to you by counsel either in court, or in motions, or attachments thereto.

In closed conferences, my voice and vote will count the same as any other member. During any recess or adjournment, we will not discuss the case with anyone, not even among ourselves. We will hold our discussions of the issues in closed conference when all members are present. In this case, we will consider only evidence properly admitted before this commission. We will not consider other accounts of the trial, or information from other sources, and we will limit our contact with counsel, the accused, and potential witnesses.

During the course of the proceedings, you may not discuss the proceedings with anyone who is not a member of the panel. If anyone who is not a member attempts to discuss the proceedings with you, notify me immediately and appropriate action will be taken. When we're in closed conference deliberations, we alone will be present. We'll remain together and allow no unauthorized intrusion into our deliberations.

Each of us has an equal voice and vote in discussing and deciding all issues submitted to us. I'll act as presiding officer during closed conference deliberations, and I'll speak for the commission in announcing results. The issue submitted will be decided based upon matters properly presented before this commission. Outside influence from superiors, other government officials, the media, or any other source will not be tolerated. If any attempt is made to influence you in the performance of your official commission duties, you shall notify me immediately. It is impermissible for the appointing authority, a military commander, or any other government official who may have influence over your career to reprimand or admonish you because of the way you perform your duties. If any such action takes place, notify me immediately.

Okay. Look, you all may serve as members and alternate on more than one case. Each case is separate. You can't consider evidence or motions from one case on another, unless I explicitly advise you that you can. Please mark any notes so that you can indicate this.

Okay. You all have seen the security arrangements around the building, in the building, and in the courtroom. Those arrangements are made by the local commander. We're required to follow the arrangements that he made because we're within his AO. You may not infer or conclude from the security arrangements that the accused is guilty of any offense, or that he presents a danger. Operational requirements of the local command have nothing to do with this accused in this courtroom. The only evidence you may consider on the determination of the guilt or innocence, or on a sentence, is evidence presented to you during proceedings. Security arrangements are not part of that evidence.

Colonel [REDACTED] you've been designated an alternate member of this commission. You may become a member should there be a vacancy that needs to be filled. As an alternate member, you will attend all open and closed sessions, but you will not be present for any closed conferences, or deliberations, unless your status changes from alternate to member. Should it change you'll get more instructions; okay?

Members, you are not authorized to reveal your vote, or

the factors that led to your vote, or the vote or comments of another member when it comes to deliberations on findings or on sentencing if we get to sentencing. This is a lawful order from me to you. You may only reveal such matters if you're required to do so by superior competent authority in the military commission process, namely the appointing authority, the general counsel, the review panel for Military Commissions, the Secretary of Defense, or the President of the United States, or by a federal district court -- a U.S. federal court. That order is continuing and does not expire. The appearance and demeanor of all of us should reflect the seriousness with which we view the trial. So pay careful attention. If you all need a break let me know. Any questions about those instructions?

Apparently not.

Objections, trial?

P (CDR [REDACTED]) No, sir.

DC (LCDR Swift): No, sir.

PO: Counsel for both sides understand the provisions of MCO-1, governing protected information?

P (CDR [REDACTED]) Yes, sir.

DC (LCDR Swift): Yes, sir.

PO: You understand that as soon as practicable, you got to notify me of any attempt to offer evidence involving protected information?

P (CDR [REDACTED]) Yes, sir.

DC (LCDR Swift): Yes, sir.

PO: Other than the protective order, which we've discussed before, is there any issue relating to the protection of witnesses that we have to take up at this time?

P (CDR [REDACTED]) No, sir.

DC (LCDR Swift): No, sir.

PO: Okay. You all know that if you got any issues on that sort of thing, you have got to let me know immediately; right?

P (CDR [REDACTED]) Aye, sir.

DC (LCDR Swift): Aye, sir.

PO: Okay. As noted on the record earlier, we've had a couple of meetings between counsel and myself, and we've also talked on the record here.

Commander Swift, on the 31st of July, you provided four notices of motion. One was a request for extension, it was granted. One was to keep me from holding sessions without members, which is O.B.E.'d (ph). One which had to do with the assistant to the presiding officer and one which had to do with keeping me from unilaterally ruling on motions law and fact; right? The only one that is still extant to any degree is the one about the assistant to the presiding officer; is that correct?

DC (LCDR Swift): It's somewhat involved in the UCI motion.

PO: Extant to some degree?

DC (LCDR Swift): Yes, sir.

PO: Okay. You also prepared -- you provided the court, what, nine motions on the 19th of August? And in each of those motions, you requested a continuance until a federal district court ruled on them; is that correct?

DC (LCDR Swift): Yes, sir.

PO: Not on them, but on your motion for habeas corpus on your writ?

DC (LCDR Swift): And mandamus, yes, sir.

PO: Okay. Are you prepared at this time to offer me any law that says I am required to give you a continuance on those motions?

DC (LCDR Swift): I would like a 15-minute recess to get the cases, sir.

PO: Do you have cases that say that?

DC (LCDR Swift): I have cases that I argue by implication.

PO: Okay. So thank you. Are you prepared to offer me a law that says I can't give him a continuance on those, Commander [REDACTED] I can't say, I can't.

P (CDR [REDACTED] Sir, we have a memorandum of law that puts out our position on why you should not, and that the defense is required to exhaust the remedies available. So, yes, sir, I would say that we do.

PO: Is required to what the remedies available?

P (CDR [REDACTED] He has to exhaust his available remedies before he can even get to the federal court. The exhaustion is this military commission and the processes that follow. So our position is until he has gone through this system, he cannot even have it litigated in federal court.

PO: Okay. Do you have -- have you prepared those motions?

DC (LCDR Swift): Have I prepared the motions?

PO: The motions?

DC (LCDR Swift): No, sir. I have not.

PO: Okay. Forgetting the law on the subject, Commander [REDACTED] what harm will you suffer if I grant him a continuance? Not until the federal court district rules, but until a more reason -- until a more reasonable time to present those motions? And I'm asking.

P (CDR [REDACTED] Sir, we don't object to you granting a continuance to a reasonable time. When I argued before it was arguing the abeyance issue, not necessarily a continuance request. We do not want to be tied to the proceedings in the federal court. Certainly, we want to be reasonable, and if the defense is asking for time to prepare, we're certainly willing to be reasonable on that matter. I would again raise the issue, though, that we are put in a difficult position because of his request and demand for a speedy trial. So as long as Commander Swift is the one requesting the continuance and that is understood by all parties involved --

PO: Well, he just said it.

P (CDR [REDACTED]) -- and the implications of that, sir. I'm sure he can say that, but for the commission as a whole I want to make sure the implications of that are understood. It is not the government, the prosecution, slowing down the process.

PO: So you have no direct harm if I grant him the continuance on those nine motions; right?

P (CDR [REDACTED]) A reasonable continuance, no, sir.

PO: Commander Swift, in connection with those nine motions, if you are not given until -- do you have any idea when the federal district court is going to rule?

DC (LCDR Swift): I should be able to give a better idea. At this time, no, sir. I expect scheduling this week transferred from Washington State to Washington District Court, and arrive while we are down here. So they have not been scheduled yet. However, we are through -- for the Presiding Officer's knowledge, we are through the position of having petition and answer and prior to transfer, we were days from argument. So if it's picked up at the same level, it could be quite quick. We are petitioning, we have an answer, and in habeas petition, it is argument and a decision and mandamus.

PO: Could you prepare those motions, say, by the 1st of October? The 1st of October is a long time from now.

DC (LCDR Swift): If -- I -- what I would like to -- yes, I can. Physically, I can write them by the 1st of October. I would hope to have some help, physically I can do that.

PO: I haven't forgotten your assistant defense counsel. We are going to address that.

DC (LCDR Swift): Yes, sir. Physically, I believe that, yes, I could write them by the 1st of October. In that portion, and I would like to be able to address the question of whether this -- in writing those motions, readdress the question of abeyance by this -- or by this panel until the federal court rules. We are basically going to be in two courts at one time. I believe the proper place to take that up would be in the motions themselves. I don't object to scheduling them, but I will again --

PO: How can I schedule the motions and listen to you argue the motions if I -- I'm missing something here.

DC (LCDR Swift): I'm requesting an abeyance on rulings -- so that if -- this happens in federal court or other courts all the time. I would give you an example, sir.

PO: Okay. Wait a second. You are requesting that we not -- that the commission not rule on the motions?

DC (LCDR Swift): Yes, sir.

PO: But you're prepared to argue them and present them?

DC (LCDR Swift): Yes, sir.

PO: Okay. And you just don't want us to present -- to rule on them?

DC (LCDR Swift): Yes, sir. I think -- can I give an example?

PO: No, because, I mean that's fine. On the 1st of October, if you give me the motions, then we can see what happens. I mean, heck, you told me they got the thing right there in D.C. They'll probably have it done by next week.

Okay. Do you object to me setting a date of the 1st of October for the motions on the nine motions that we are talking about to be received?

P (CDR [REDACTED]) No, sir.

PO: Thank you. In your motion, you may include whatever you want, because by that time you'll know more about what is going on about whatever the abeyance issue was. Abeyance -- okay. So we've got your nine motions due on the 1st.

You have seen his notices. Can you have your responses, when can you have your responses to him?

DC (LCDR Swift): I'd would like two weeks, sir.

PO: What is that, the 15th? You are writing all this down; right?

P (CDR [REDACTED]) I've got it, sir.

PO: Okay. And will a week be enough for you to do a reply?

DC (LCDR Swift): Yes, sir.

PO: Okay. I thought so. There, that's your nine motions, and somewhere buried in there is the notice of motion that you're still doing about the assistant to the presiding officer. Can you -- no, by the 1st of October, advise counsel, advise the prosecution and the commission whether or not you intend to go forward on that issue; okay?

DC (LCDR Swift): I will, sir.

PO: Thanks.

P (CDR [REDACTED]) Sir, I would just ask that if he does intend to go forward on that issue, we ask that his actual motion for that issue be due on the 1st of October.

DC (LCDR Swift): It will be possible.

PO: Look at that, he is ready.

P (CDR [REDACTED]) We're Navy guys, we cooperate, sir.

PO: Okay. Now, Commander Swift, you've provided two motions to me and opposing counsel yesterday?

DC (LCDR Swift): Yes, sir, I did.

PO: At 2130 last night, Captain [REDACTED] caught me and said, here is our response.

DC (LCDR Swift): It's wonderful to have assets, sir.

PO: Right. I agree. Okay. You have requested a continuance in the argument, the oral argument by counsel on those motions?

DC (LCDR Swift): Yes, sir, I have.

PO: And you say, okay, judge, because he also said that when those motions are now complete they can go to the commission members, and all we have to do is argue there's going to be no evidence called on them whatsoever except what has been put in. So you don't object to a continuance, other than a standard

objection?

P (CDR [REDACTED]) Let's be careful on that, sir. We don't anticipate, and I don't believe the defense anticipates any witnesses. We also attached evidence to our motion response, and we would like the evidence we attach to our response and --

PO: Perhaps I said it incorrectly. I have here in my hot little hand, his motions and your responses. That is all that is going to be going to the members. And when we meet to discuss this, all I am going to hear from you all is argument?

P (CDR [REDACTED]) Correct, sir.

PO: Right?

DC (LCDR Swift): Yes, sir.

PO: Okay. Now, would you agree that when we come back to hear the motions, the nine motions, and perhaps the one motion we could also hear these two motions?

DC (LCDR Swift): Yes, sir.

P (CDR [REDACTED]) Yes, sir.

PO: Thank you. I'm going to look at a date -- what date were we up to now by his reply? Was it --

P (CDR [REDACTED]) He has 11 -- okay his reply takes us to the 22nd of October.

PO: My birthday. I am going to talk to the members and see if we can schedule a session the first week in November. I'm not talking to them right now, I am just sort of looking at them. Is there anything impossible for counsel about the first week in November?

P (CDR [REDACTED]) No, sir.

DC (LCDR Swift): There is only one consideration and I would like to talk to my client about it. It is that I believe that the first week in November we'll be in Ramadan, and I am going to ask him whether he will be fasting for the period of time. If -- I hadn't consulted with him on that, if I could have a moment?

The defense counsel and accused conferred.

DC (LCDR Swift): My client does not have an objection during the periods of Ramadan, so I have no objection.

PO: Okay. Bailiff, please grab those motions from the court reporter and bring them over here. RE next, which is 11, will be defense motion for dismissal based on unlawful command influence. 12 will be the prosecution response. 13, dismissal for failure to accord the accused a status review hearing; and 14 the prosecution response.

I intend, counsel, to give members copies of both motions, and they will review them so they will be prepared to listen to counsel argument when we come back. Any problems with that?

P (CDR [REDACTED]): No objection, sir.

DC (LCDR Swift): No objection, sir.

PO: I direct counsel to file with me by the 11th -- the 10th of September, briefs. These briefs will address the meaning of the provision of MCO Number 1, section 4(A)5(D). Specifically, these briefs will focus on whether these two motions, RE 11 and 13, are interlocutory questions which must be certified to the appointing authority for his decision because the disposition of the motion would affect a termination of the proceedings. In other words, am I required to certify these motions, or am I only required to certify the motions if the commission is prepared to issue a ruling granting those motions.

Any questions about what I'm talking about?

P (CDR [REDACTED]): No, sir.

DC (LCDR Swift): No, sir.

PO: Okay. Counsel for both sides, I've issued various presiding officer memoranda. If you have objections, state them now or provide them to me in writing by next Tuesday. Got it?

Okay. Through motions and discussions, I have learned that there's concerns about communication with the

office of the appointing authority. Does counsel for either side object to me requesting interpretations of the MCO or MCIs and the appointing authority's area of interest directly by mail, or e-mail from me to Mr. Altenburg after notice to counsel and providing counsel the opportunity to brief the issue?

P (CDR [REDACTED]) No, sir, we would not. Although obviously we want what occurs to be made a matter of record formally.

DC (LCDR Swift): Yes, sir. We don't object, sir. We understand that it will be a part of the record.

PO: Accused and counsel, please rise.
Salim Ahmed Hamdan, how do you plead?

DC (LCDR Swift): Salim Ahmed Hamdan through counsel defers pleas until the resolution of motions.

PO: Requests deferral, please?

DC (LCDR Swift): We request deferral of resolution of motions.

PO: Be seated. Do you have any objection to the deferral of entry of pleas?

P (CDR [REDACTED]) No objection, sir.

PO: Okay. Does counsel for either side have anything further at this time? [Negative response]

Members, anything further at this time? [Negative response]

The court is in recess to meet upon further call, or as scheduled on the record.

DC (LCDR Swift): Sir, actually, I'm sorry. Sorry.

PO: The court is called to order. Let the record reflect that all parties present when the court recessed are still present in the courtroom.

Yes, Commander Swift?

DC (LCDR Swift): I'm sorry. Sir, I have one administrative note not requiring the other members that I would like to

take up with yourself outside, on the record. It has to do with your voir dire of the presiding officer.

PO: All rise.

Members, you are in recess.

The members departed the courtroom.

Be seated. The court will come to order and let the record reflect all the members except for myself have left the courtroom. All the other parties are present.

Yes, Commander?

DC (LCDR Swift): Yes, sir. It came to my attention after the voir dire that there was a tape made regarding the 15 July meeting between yourself and counsel. I'd like permission to send that tape along with the other matters that I'm submitting on your voir dire regarding your qualifications.

PO: And why would you like that?

DC (LCDR Swift): To go toward the idea of whether you have an opinion or not, sir.

PO: On the questions of?

DC (LCDR Swift): Speedy trial, sir.

PO: Okay. And the tape goes to show what?

DC (LCDR Swift): Your opinion at the time, sir. I have not yet transcribed it. If it doesn't show anything -- I am proceeding here based on what I've been told by other counsel.

PO: Okay. I would be -- let me think about this. Okay, let me think about this. I am reopening the voir dire of me. Explain to me -- ask me what you want about what I said or may have said on the 15th.

DC (LCDR Swift): Yes, sir. It's my understanding, sir, that on the 15th you expressed an opinion as to whether the accused have -- whether any detainee had a right to a speedy trial.

PO: Do you think that's correct or do you think that's in reference to Article 10?

DC (LCDR Swift): My understanding from counsel was that it referenced whether they would have a right to a speedy trial under Article 10 or rights, generally. I confess, sir, I have not heard the tape.

PO: Okay. Why don't you ask me if I am predisposed on that.

DC (LCDR Swift): Are you predisposed towards those issues, sir?

PO: I believe in the meeting -- I don't remember speedy trial, I remember Article 10 being mentioned, and I believe I said something to the effect of, Article 10, how does that come into play, or words to that effect. I did not know that my words were being taped, and I must confess that when I walked into the room that day I had no idea that Article 10 would come into play because I hadn't had an occasion to review Article 10. It is not something that usually comes up in military justice prudence -- jurisprudence. So I'm telling you right now that I don't have a predisposition towards speedy trial. However, although the tape was made without my permission, without the permission of anyone in the room, I do give you permission to send it to the appointing authority with the other matters.

DC (LCDR Swift): Sir, what I would like to ask, if I transcribe it, that I send it to you first.

PO: I don't want to see it.

DC (LCDR Swift): Yes, sir.

PO: Okay. Well, wait a second. Do you want to change -- do you want to add on anything to your challenge or stick with it?

DC (LCDR Swift): No, sir.

PO: How about you?

P (CDR [REDACTED]) No objection to the tape being sent, sir.

PO: Okay. Before I call -- I put the court in recess, Commander Swift, do you have anything else?

DC (LCDR Swift): No, sir, I don't; I really don't, we really don't, sir.

PO: Trial?

P (CDR [REDACTED]) We really, really don't, sir.

PO: Court is in recess.

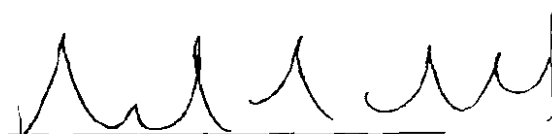
The Commission Hearing recessed at 1835, 24 August 2004.

AUTHENTICATION OF COMMISSIONS PROCEEDINGS

in the case of

United States v. SALIM AHMED HAMDAN
a/k/a Salim Ahmad Hamdan
a/k/a Salem Ahmed Salem Hamdan
a/k/a Saqr al Jadawy
a/k/a Saqr al Jaddawi
a/k/a Khalid bin Abdallah
a/k/a Khalid wl'd Abdallah

This is to certify that Pages 113 through 136 are an accurate
and verbatim transcript of the foregoing proceedings.



Peter E. Brownback III
Colonel, U.S. Army
Presiding Officer

26 AUGUST 2004
Date

1 *The Commission Hearing was called to order at 1308, 8 November 2004.*
2

3 PO: Please be seated. The commission is called to order.
4

5 P (CDR [REDACTED]): All parties present when the commission recessed on 24 August 2004 are
6 once again present with the following exceptions: Colonel [REDACTED]
7 Lieutenant Colonel [REDACTED] and Lieutenant Colonel [REDACTED] have all been
8 permanently excused by the appointing authority.
9

10 The court reporter is Sergeant [REDACTED] and has been previously
11 sworn.
12

13 The bailiff, Sergeant [REDACTED] has previously been sworn. The
14 security officer, [REDACTED] has been previously sworn. The interpreters
15 have been detailed for this commission and have been previously sworn.
16

17 The CVs of the commission translators are contain in Review Exhibit 45.
18

19 PO: All parties are reminded of Review Exhibit 4. the protective order concerning the
20 interpreters. We are not going to name each interpreter that goes in and out
21 of the booth. Is that okay with both sides? Trial?
22

23 P (CDR [REDACTED]): Yes, sir.
24

25 DC (Commander Swift): Defense agrees, sir.
26

27 PO: Okay. To the left, or somewhere in the court room, are some headphones if you
28 want to hear the proceedings in Arabic. Please return them when you leave
29 the courtroom.
30

31 We have got translators translating. Please speak in short bursts. Please
32 don't interrupt each other.
33

34 We have got two new defense counsel today. Would you please identify
35 yourself, sir?
36

37 ADC (Mr. Katyal): Neal Katyal.
38

39 PO: You can say -- I'm sorry, Commander Swift, you can stand up if you want to.
40 Where are you from, sir?
41

42 ADC (Mr. Katyal): Washington D.C.
43

44 PO: And you are licensed to practice before --
45

46 ADC (Mr. Katyal): In Washington D.C.

1
2 PO: Okay. Mr. Katyal's letter of acceptance to the commission is RE 44. I will
3 administer the oath to Mr. Katyal now.

4 *The counsel was sworn.*
5

6 PO: Captain Autorino, will you please state your detailing and qualifications and status
7 as to oath.
8

9 ADC2 (Capt Autorino): Yes, sir. My name is Kristine Autorino, the defense counsel. I
10 have been detailed to this case by Colonel Gunn -- Colonel William Gunn,
11 the chief defense counsel appointed to the Office of Military Commissions.
12 I have been sworn by him.
13

14 PO: And your detailing letter is RE 46?
15

16 ADC2 (Capt Autorino): Yes, sir. Thank you.
17

18 PO: Thank you. Okay, Mr. Hamdan, at our last session I explained to you your rights
19 to a counsel. Do you remember that?
20

21 ACC: Yes.
22

23 PO: Okay, you don't have to stand up. You told me that you were happy with
24 Commander Swift, but you believed he needed an assistant. Do you
25 remember that?
26

27 ACC: Yes.
28

29 PO: You now have two additional lawyers on the case, Mr. Katyal and Captain
30 Autorino. Do you want them to help on the case along with Commander
31 Swift?
32

33 ACC: Yes.
34

35 PO: Commander Swift, who is the lead counsel for the defense?
36

37 DC (Commander Swift): Mr. Hamdan -- sir, Mr. Hamdan has designated myself as lead
38 counsel for the defense.
39

40 PO: Mr. Hamdan, do you want Commander Swift as the lead counsel for your defense
41 team?
42

43 ACC: Yes.
44

45 PO: The absent members and alternate member were permanently excused by the
46 appointing authority during his action on challenges. Their permanent
excusal is reflected in RE 47.

1 The three remaining members fulfill the requirements of MCO number 1,
2 Section 4(A). Prior to the start of this session there was an MCI 8-5
3 conference, present at which were trial counsel, defense counsel, and the
4 presiding officer. We covered a lot of items that we are going to go over
5 this week. If either side believes that something was brought up that we
6 don't cover or I don't mention, please speak up.
7

8 Among the matters we covered was the burden of persuasion in motions
9 practice. As a general rule, the burden of persuasion is on the moving party.
10 If any party believes that the burden has shifted or will shift to the opposing
11 side, that party has an obligation to tell the commission. Questions on that,
12 trial counsel or defense?
13

14 P (CDR [REDACTED]): No, sir.
15

16 DC (Commander Swift): The defense does have questions, sir.
17

18 PO: Okay.
19

20 DC (Commander Swift): We understand discussing or indicating who has the burden of
21 persuasion. However, after our meeting it was discussed and it was pointed
22 out that one of the things we are going to be talking about is the military
23 commission instruction orders and their legality. And for that, there is also
24 the standard of review that the commission is utilizing. That is --
25

26 PO: So no one will misunderstand, when I hold my hand up it is not to stop
27 Commander Swift from making his point. It is because I believe he was
28 running on so that the translators couldn't keep up. Go on.
29

30 DC (Commander Swift): Normally, when a court reviews an order, or a law, or an
31 instruction, there is question of whether the standard is clearly erroneous;
32 that is, the instruction or order is given deference, or de novo. De novo
33 means that the court looks at the standard or looks at the order and gives it
34 no deference and determines independently whether the order instruction or
35 law is, in fact, valid. And we believe that, a, both sides at the onset,
36 knowing not only who has the burden of persuasion, but what the standard
37 of review would be.
38

39 PO: Thank you for springing that on me. If you give us something, we will think about
40 it. Okay?
41

42 DC (Commander Swift): Yes, sir.
43

44 PO: Speaking of which, we covered the obligation of both sides to present to the other
45 side in the commission matters which they intend to use or rely upon during
46 these proceedings.

1
2 This has got to be done in a timely manner. If a party attempts to use
3 matters which were not furnished in a timely manner, the commission may
4 decide to set that motion for the next session of the commission.
5

6 Counsel may wish, but are neither encouraged nor required, to provide the
7 commission with draft findings of fact and conclusions of law for any
8 particular motion. If counsel so intend, they will advise the commission
9 during their portion of the argument.
10

11 Such matters will be presented to the opposing party within 24 hours of the
12 argument. Opposing counsel will have 48 hours from the time of receipt to
13 comment thereon unless the presiding officer grants a delay.
14

15 Take note, the commission is not required to wait upon such matters prior to
16 making a decision. Comment, trial?
17

18 P (CDR [REDACTED]): No, sir.
19

20 PO: Defense?
21

22 DC (Commander Swift): No, sir.
23

24 PO: Since the recess in August, there has been a lot of work done and a great deal, or
25 number, rather, of filings exchanged concerning this case. The sessions this
26 week are designed to address the issues which those filings have revealed or
27 created.
28

29 Before we start, I want to put on the record the filings inventory for U. S. V
30 Hamdan, version 15, dated 8 November, '04. This inventory assigns a
31 number to all filings and the numbers such as D 8, P 7 are used to refer to
32 various filings. A new inventory will be attached as necessary. Today's
33 inventory is RE 48.
34

35 Since the recess in August, I issued POMS 2-1, 4-2, 6-1, 9, 10, and 12. A
36 complete copy of all current POMS is attached as RE 49. Counsel were
37 given an opportunity to object to the POMS. I now ask, though, are there
38 any objections to any of the POMS; trial?
39

40 P (CDR [REDACTED]): No, sir.
41

42 DC (Commander Swift): Defense has none at this time, sir.
43

44 PO: Members, do you all believe that the issuance of the POMS and the subject matter
45 contained therein is within the providence of the presiding officer?
46

1 CM (Col [REDACTED]): Yes.

2
3 CM (Col [REDACTED]): Yes.

4
5 PO: Under the provisions of MCO number 1, I forwarded certain interlocutory
6 questions to the appointing authority. Interlocutory Questions 1 through 5
7 and the responses by the appointing authority are attached to the record as
8 RE 50 through RE 54 respectively.

9
10 In connection with the response to Interlocutory Question 4, I provided a
11 memorandum to all counsel concerning my interpretation of the term
12 "necessary instructions" in MCI 8. Basically, I will issue those instructions
13 which any military officer designated to preside over a commission or a
14 board might be required to issue. Have both members had a chance to
15 review that decision memorandum RE 55?

16
17 CM (Col [REDACTED]): Yes.

18
19 CM (Col [REDACTED]): Yes.

20
21 PO: Do both members agree that that is a correct interpretation of the term "necessary
22 instructions?"

23
24 CM (Col [REDACTED]): Yes.

25
26 CM (Col [REDACTED]): Yes.

27
28 PO: Trial, defense, comment on RE 55?

29
30
31 P (CDR [REDACTED]): No comment, sir.

32
33 DC (Commander Swift): No comment, sir.

34
35 PO: Members, prior to our session on 24 August, I provided you certain administrative
36 instructions concerning transportation and publicity, among other things.
37 Neither side objected to those instructions and I do not intent to revoke
38 them now.

39
40 After voir dire, I stated the following: "As the only lawyer appointed to the
41 commission, I will instruct you on the law." My interpretation of
42 commission law at the time was overbroad and the instruction that I will
43 instruct you on the law is withdrawn. Instead, I advise you that all members
44 of the commission have an equal say on what the law is and I will not
45 instruct you on the law. I will participate in all discussions and
46 deliberations by the commission and on all questions on law and fact.

1
2 During all discussions and deliberations, I will certainly use my knowledge,
3 skill, and training as will the other members of the commission. But,
4 ultimately, your position or vote on what the law is is no lesser or greater
5 than that of any other member, including me. Do each of you understand
6 and agree with that?
7

8 CM (Col [REDACTED]): Yes.
9

10 CM (Col [REDACTED]): Yes.
11

12 PO: Comments, trial?
13

14 P (CDR [REDACTED]): No, sir.
15

16 PO: Defense?
17

18 DC (Commander Swift): No, sir.
19

20 PO: In that 8-5 -- or, I am sorry, tack 5; in that 8-5 session, we covered the general
21 order in which counsel want to present motions. The order doesn't make
22 everyone happy, but it is what we are going with. D 39; D 14 withdrawn
23 with comments; D 34 through 38; P 8; D 13: a discussion about a videotape
24 associated with D 22; D 17: a short lead-in to D 40; a request by the defense
25 for the presiding officer to rule on D 30 through 32. And a brief initial
26 discussion on possible trial dates.
27 Trial, defense, is that correct?
28

29 P (CDR [REDACTED]): Yes, sir.
30

31 DC (Commander Swift): Yes, sir.
32

33 PO: Okay. Defense, you are starting with D 39, which have been marked as RE 43.
34

35 DC (Commander Swift): If it pleases the commission. Good afternoon, sirs, the presiding
36 officer earlier made the statement in his recitation of the trial script to this
37 point, the panel was properly composed in accordance with Military Order
38 number 1, paragraph 4. It is obvious by the motion that we disagreed with
39 that statement at the time it was made and we seek opportunity to argue it.
40

41 Specifically, this is an area of commission law where we really have no
42 precedent. My review of other commission cases never dealt with the
43 subject that I have been able to find. We are left then with the plain
44 language of Military Order Number 1. Military Order Number 1 was issued
45 by the Secretary of Defense pursuant to his authority from the President of
46 the United States to establish rules and procedures. This is in essence a

1 procedural question, the substance of ramifications. That is, it affects the
2 substance of the trial and is a procedural issue.

3
4 What we are left with is the plain language of the paragraphs and basically
5 what does word "shall" mean. "Shall" have alternate members. The
6 commission in paragraph 4 indicates that there shall be an alternate
7 member. And it also goes further to say that that alternate member shall
8 take the place of any person or any member who is removed from the panel.
9

10 The reading appears to clearly contemplate that when any panel member is
11 removed -- as you will recall, the last time we were together there was five
12 panel members -- that if any panel member were removed, an alternate
13 would take that panel member's place. The paragraph does not specify what
14 would happen if there is no alternate member. It simply states that there
15 shall be an alternate member.
16

17 It is the defense's position that the plain language reading mandates that at
18 this point, that an alternate member be appointed by the appointing
19 authority. Once that alternate member is appointed, under the plain
20 language of the military order, he or she shall be appointed to take the place
21 of someone who has been removed in this case, either Colonels B or T.
22 Lieutenant Colonel T.
23

24 To understand the plain language better, perhaps it is best to look at the
25 position of the appointing authority which, excuse me, position of the
26 presiding officer. Subsequent paragraphs go on to point out that the
27 appointing officer or, excuse me, the presiding officer shall be a judge
28 advocate. Were we to take the reading of these paragraphs in the way that
29 the government has suggested, that is not exactly true because "shall" would
30 only mean at the commencement the presiding officer will be a judge
31 advocate, but that later, he need not be.
32

33 The consistent use of "shall", in the plain language of this instruction is a
34 mandate. The commission rules -- well worth noted that it has been sixty
35 years since we have done a commission and this is the first time we we're
36 trying these procedural rules. And so, it is not necessarily surprising that
37 the appointing authority did not consider or may not have considered the
38 absolute plain language before him.
39

40 In fact, in his order, which is part of the record, he indicated that there shall
41 be no more members. Now, that really doesn't make sense because
42 certainly the appointing authority cannot see the future. And while we
43 certainly wish no ill will on any panel member, the potential outcome is that
44 one of the panel members might not be able to serve in the future.
45

46 Does that mandate then that there is a mistrial? Or all charges are dismissed

1 against Mr. Hamdan? There was a good policy reason, as we pointed out in
2 our motion, for the Secretary to set up the panel the way he did. As the
3 members are well aware, this is not a court-martial with the same jury-type
4 protections. At a court-martial, quorum is what counts, one of them being
5 defined as the minimum number required. But in this situation, where you
6 don't have peremptory challenges, and you start with a panel of five, Mr.
7 Hamdan, if the instruction is read as the government's suggests, was left
8 with a Hobson's choice. You see, as you would later been instructed or
9 certainly concluded for yourself, at five, the government must carry four
10 members in order to obtain a conviction. At four, the government must
11 obtain three members and at two, two members. Or put another way,
12 Mr. Hamdan, in all cases, needs two.

13
14 So Mr. Hamdan's choice is to mathematically remove members whose votes
15 the government must receive, not speculatively, or allow such a member to
16 sit on the panel. This seemingly defeats any purpose of voir dire.

17
18 We take the panel well that they would not be influenced by another
19 member in their deliberation. They swore to do that and we understand it.
20 The question is only to that member's neutrality. It seems incredibly ironic
21 that a member would be removed because they were likely or perceived as
22 likely to vote for the government, but once removed, the government did
23 not need their vote at all.

24
25 In August, that plain language was my understanding. However, if my
26 understanding is nevertheless an error on the function that alternative
27 members will not be appointed, then based on that misunderstanding, I
28 acted in a manner disfavorable to my client, clearly. And as such, since we
29 are without precedent, I would seek to withdraw at this time my challenges
30 and seek the reappointment of the panel members, Colonels B and Colonel
31 T -- Lieutenant Colonel T -- to this panel as the appropriate remedy if my
32 read is an error.

33
34 I also realize, panel members, that I am making an argument to a group that
35 cannot immediately remedy my complaint.

36 The military commission order or -- is quite clear. No one here has the
37 authority to appoint a member. However, there is a solution set out inside
38 the military commission instructions. We request that this panel certify as
39 an interlocutory question whether the plain language mandating shall have
40 an alternate member and such alternate members shall replace any member
41 who is removed for any reason mandates the appointment of alternate
42 members and the filling of the two vacancies created by the appointing
43 authority's action. It is not clear based on the appointing officers -- the
44 appointing authority's findings that they consider the plain language in this
45 or this issue at the depth that I have presented it. And as such, we request
46 you certify that interlocutory question for resolution and to abate the

1 proceedings.

2
3 Now, we do not believe that that necessarily requires a significant
4 abatement. The question may be sent to the appointing authority this
5 afternoon and answered tomorrow. If the -- that is at the discretion, of
6 course, of the appointing authority, is how to the speed with which they
7 answer it. But the defense is confident that the appointing authority is
8 aware that the commission is ongoing and would seek to resolve such a
9 question quickly. It is a plain language question and in the defense's
10 experience not requiring further or significant research of either
11 international law or national law.

12
13 Thank you for your attention, sir.

14
15 PO: Court is in recess.

16 *The commission is in recess at 1341, on 8 November 2004.*

17 *The commission came to order at 1346, on 8 November 2004.*

18 PO: Be seated.

19
20 Let the record reflect that all parties present when the court recessed are
21 again present. I came back on the record to state that we are going to have
22 an indefinite recess and that is all the business I am taking care of.
23 Commission is in recess.

24 *The Commissions Hearing recessed at 1347, 8 November 2004.*

AUTHENTICATION OF COMMISSIONS PROCEEDINGS

United States v. SALIM AHMED HAMDAN

a/k/a Salim Ahmad Hamdan

a/k/a Salem Ahmed Salem Hamdan

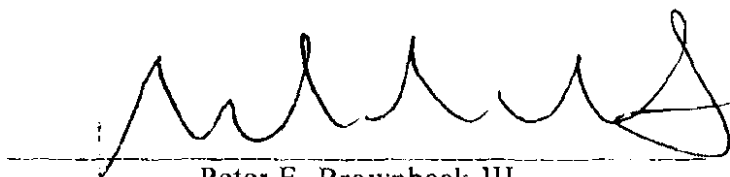
a/k/a Saqr al Jadawy

a/k/a Saqr al Jaddawi

a/k/a Khalid bin Abdallah

a/k/a Khalid w'l'd Abdallah

This is to certify that pages 137 through 146 are an accurate and verbatim transcript of the forgoing proceedings.

A handwritten signature in black ink, consisting of a series of loops and peaks, written over a horizontal line.

Peter E. Brownback III
Colonel, JA
Presiding Officer

18 AUGUS 2005

Date

**RECORD OF TRIAL
COVER SHEET**

**IN THE
MILITARY COMMISSION
CASE OF**

**UNITED STATES
V.
SALIM AHMED HAMDAN**

ALSO KNOWN AS:

**SALIM AHMAD HAMDAN
SALIM AHMED HAMDAN
SALEM AHMED SALEM HAMDAN
SAQR AL JADAWY
SAQR AL JADDAWI
KHALID BIN ABDALLAH
KHALID WL'D ABDALLAH**

No. 040004

VOLUME ____ OF ____ TOTAL VOLUMES

1ST VOLUME OF REVIEW EXHIBITS (RE)—

**RE 1-15 FOR AUGUST 24, 2004 SESSION
(REDACTED VERSION)**

United States v. Salim Ahmed Hamdan, NO. 040004

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A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at <http://www.defenselink.mil/news/commissions.html>.

The volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.

After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to this administrative certification.

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I*	Military Commission Primary References (President's Military Order; Military Commission Orders; DoD Directive; Military Commission Instructions; Appointing Authority Regulations; Presiding Officer Memoranda)—includes rescinded publications
II*	Supreme Court Decisions: <i>Rasul v. Bush</i>, 542 U.S. 466 (2004); <i>Johnson v. Eisentrager</i>, 339 U.S. 763 (1950); <i>In re Yamashita</i>, 327 U.S. 1 (1946); <i>Ex Parte Quirin</i>, 317 U.S. 1 (1942); <i>Ex Parte Milligan</i>, 71 U.S. 2 (1866)
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UNITED STATES V. SALIM AHMED HAMDAN NO. 040004--REVIEW EXHIBITS


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and Appointing Authority decision are each one page in length.	
<u>RE 51</u> Interlocutory Question No. 2—Presiding Officer submits suggestion that some sessions be held outside Guantanamo and by conference call. Request and Appointing Authority decision are each one page in length.	<u>249</u>
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<u>RE 53</u> Presiding Officer submits Interlocutory Question No. 4--Seeks clarification of when the Presiding Officer should provide instruction(s) to the commission members. Request is four pages in length and Appointing Authority decision is one page in length.	<u>254</u>
<u>RE 54</u> Presiding Officer submits Interlocutory Question No. 5--Seeks clarification of when alternate member(s) are replaced. Request is four pages in length and Appointing Authority decision is one page in length.	<u>259</u>
<u>RE 55</u> Instructions by the Presiding Officer (1 page)	<u>264</u>
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<u>RE 58</u> Memorandum detailing prosecutors, Nov. 5, 2004 (1 page)	<u>269</u>

FOR OFFICIAL USE ONLY

No. 040004

UNITED STATES)	
)	
v.)	
)	
SALIM AHMED HAMDAN)	Approval of Charge
a/k/a Salim Ahmad Hamdan)	And Referral
a/k/a Salem Ahmed Salem Hamdan)	
a/k/a Saqr al Jadawy)	July 13, 2004
a/k/a Saqr al Jaddawi)	
a/k/a Khalid bin Abdallah)	
a/k/a Khalid wl'd Abdallah)	

The charge against Salim Ahmed Hamdan (a/k/a Salim Ahmad Hamdan, a/k/a Salem Ahmed Salem Hamdan, a/k/a Saqr al Jadawy, a/k/a Saqr al Jaddawi, a/k/a Khalid bin Abdallah, a/k/a Khalid wl'd Abdallah) is approved and referred to the Military Commission identified at Encl 1. The Presiding Officer will notify me not later than July 26, 2004, of the initial trial schedule, including dates for submission and argument of motions, and a convening date.


John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

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Review Exhibit 1

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No. 040004

UNITED STATES

v.

SALIM AHMED HAMDAN

a/k/a Salim Ahmad Hamdan

a/k/a Salem Ahmed Salem Hamdan

a/k/a Saqr al Jadawy

a/k/a Saqr al Jaddawi

a/k/a Khalid bin Abdallah

a/k/a Khalid wl'd Abdallah

Military Commission Members

July 13, 2004

The following officers are appointed to serve as a Military Commission for the purpose of trying any and all charges referred for trial in the above-styled case. The Military Commission will meet at such times and places as directed by the Appointing Authority or the Presiding Officer. Each member of the Military Commission will serve until relieved by proper authority.

In the event of incapacity, resignation, or removal of a member who has not been designated as the Presiding Officer, the alternate member is automatically appointed as a member.

Colonel Peter E. Brownback, III, USA (Retired), Presiding Officer

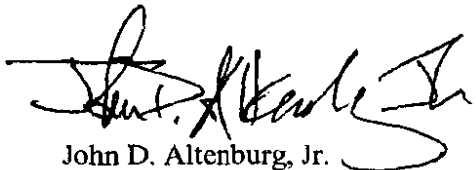
Colonel [REDACTED] Member

Colonel [REDACTED] Member

Colonel [REDACTED] Member

Lieutenant Colonel [REDACTED] Member

Lieutenant Colonel [REDACTED] Alternate Member



John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

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Page 2 of 2

~~SECRET//NOFORN~~
THE WHITE HOUSE
WASHINGTON

OFFICE OF THE
SECRETARY OF DEFENSE
2003 JUL 14 PM 5:12

TO THE SECRETARY OF DEFENSE:

Based on the information available to me from all sources, including the factual summary from the Department of Defense Criminal Investigation Task Force dated June 24, 2003 and forwarded to me by the Deputy Secretary of Defense by letter dated July 1, 2003;

Pursuant to the Military Order of November 13, 2001 on "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism";

In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40);

I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the Armed Forces of the United States, hereby DETERMINE for the United States of America that in relation to Salim Ahmed Hamdan, Department of Defense Internment Serial No. US9YM-00149DP, who is not a United States citizen:

(1) There is reason to believe that he, at the relevant times:

- (a) is or was a member of the organization known as al Qaida;
- (b) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
- (c) has knowingly harbored one or more individuals described in subparagraphs (a) or (b) above.

(2) It is in the interest of the United States that he be subject to the Military Order of November 13, 2001.

Accordingly, it is hereby ordered that, effective this day, Salim Ahmed Hamdan shall be subject to the Military Order of November 13, 2001.

DATE: *July 3, 2003*

White House Office-controlled Document

~~SECRET//NOFORN~~
DECLASSIFIED IAW
JTF-GTMO-J2 SCG,
10 JUN 2004
DECLASSIFIED ON: 23 AUG 2004

Interpreters

[REDACTED]

[REDACTED]

[REDACTED]

**PROTECTIVE ORDER
FOR OFFICIAL USE ONLY**

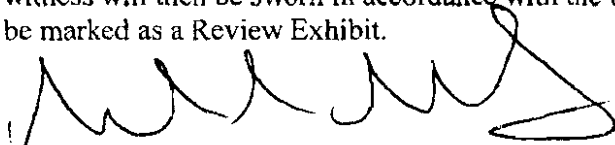
UNITED STATES v. SALEM AHMED SALEM HAMDAN

PROTECTIVE ORDER: Full Names of Interpreters and Translators and Interpreters on the Record

1. The Presiding Office is in receipt of a communication from the Program Manager of the International Language Service (ILS) (relevant portions pasted below.) The ILS provides translator/interpreter for Commission trials. In that communication, the Program Manager requests that only the first name of ILS translator/interpreter be spoken in open session, and that their full names be omitted for security reasons on behalf of the translator/interpreter.

2. I direct that the full names of ILS translator/interpreter not be spoken on the record unless directed otherwise.

3. To ensure that the written record is complete with respect to the identity of the translator/interpreter, the Prosecutor will hand the translator/interpreter a piece of paper with the name of the translator/interpreter asking if their full name is written correctly on the paper. The witness will then be sworn in accordance with the trial guide. The paper with the full name will be marked as a Review Exhibit.



PETER E. BROWNBAC, III
COL, JA, USA
Presiding Officer

From: [REDACTED]
Sent: Wednesday, August 18, 2004 10:50
To: [REDACTED]
Subject: RE: addresses

[REDACTED]

Review Exhibit 4
1 of 1 page



DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

July 28, 2004

MEMORANDUM FOR COMMANDER [REDACTED]
LIEUTENANT COLONEL [REDACTED]
LIEUTENANT COLONEL [REDACTED]
MAJOR [REDACTED]
CAPTAIN [REDACTED]
LIEUTENANT [REDACTED]
CAPTAIN [REDACTED]

SUBJECT: Detailed Prosecutors

Consistent with my authority as Chief Prosecutor and the provisions of Sections 4B(2) of Military Commission Order No. 1, dated March 21, 2002, and Section 3B(9) of Military Commission Instruction No. 3, dated April 30, 2003, the above named counsel are detailed and designated as follows:

United States v. al Bahlul

Detailed Prosecutor: Commander [REDACTED]

Detailed Assistant Prosecutors: Lieutenant Colonel [REDACTED] Captain [REDACTED]

United States v. al Qosi

Detailed Prosecutor: Lieutenant Colonel [REDACTED]

Detailed Assistant Prosecutors: Lieutenant [REDACTED] Captain [REDACTED]

United States v. Hamdan

Detailed Prosecutor: Commander [REDACTED]

Detailed Assistant Prosecutors: Captain [REDACTED]

United States v. Hicks

Detailed Prosecutor: Lieutenant Colonel [REDACTED]

Detailed Assistant Prosecutors: Major [REDACTED]

ROBERT SWANN
Colonel, U.S. Army
Chief Prosecutor
Office of Military Commissions

cc:
Deputy Chief Prosecutor
Mr. [REDACTED]





DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

23 July 2004

MEMORANDUM DETAILING DEFENSE COUNSEL

TO: Lieutenant Colonel Sharon Shaffer, Major Mark Bridges, Major Michael Mori, LCDR Philip L. Sundel, LCDR Charles D. Swift

SUBJECT: Detailed Defense Counsel

Consistent with my authority as Chief Defense Counsel and the provisions of sections 4C and 5D of Military Order No. 1, dated March 21, 2002, and section 3B of Military Commission Instruction # 4, dated 15 April 2004, the above named counsel are detailed and designated as follows:

United States v. Al Bahlul

Detailed Defense Counsel: LCDR Philip Sundel

Assistant Detailed Defense Counsel: Major Mark Bridges

United States v. Al Qosi

Detailed Defense Counsel: Lieutenant Colonel Sharon Shaffer

United States v. Hamdan:

Detailed Defense Counsel: LCDR Charles Swift

United States v. Hicks:

Detailed Defense Counsel: Major Michael Mori

Colonel Will A. Gunn, USAF
Chief Defense Counsel
Office of Military Commissions



UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

a/k/a Salim Ahmad Hamdan

a/k/a Salem Ahmed Salem Hamdan

a/k/a Saqr al Jadawy

a/k/a Saqr al Jaddawi

a/k/a Khalid bin Abdallah

a/k/a Khalid wl'd Abdallah

)
)
)
) **CHARGE:**
) **CONSPIRACY**
)
)
)
)
)
)
)

Salim Ahmed Hamdan (a/k/a Salim Ahmad Hamdan, a/k/a Salem Ahmed Salem Hamdan, a/k/a Saqr al Jadawy, a/k/a Saqr al Jaddawi, a/k/a Khalid bin Abdallah, a/k/a Khalid wl'd Abdallah) is a person subject to trial by Military Commission. At all times material to the charge:

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 3, 2003 that Salim Ahmed Hamdan (a/k/a Salim Ahmad Hamdan, a/k/a Salem Ahmed Salem Hamdan, a/k/a Saqr al Jadawy, a/k/a Saqr al Jaddawi, a/k/a Khalid bin Abdallah, a/k/a Khalid wl'd Abdallah, hereinafter "Hamdan") is subject to his Military Order of November 13, 2001.
2. Hamdan's charged conduct is triable by a military commission.

GENERAL ALLEGATIONS

3. Al Qaida ("the Base"), was founded by Usama bin Laden and others around 1989 for the purpose of opposing certain governments and officials with force and violence.
4. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.
5. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.
6. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee;

Review Exhibit

7

Page

1

Of

3

security committee; finance committee; media committee; and religious/legal committee.

7. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan and other countries for the purpose of supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.
8. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian Peninsula.
9. In February of 1998, Usama bin Laden, Ayman al Zawahari and others under the banner of the "International Islamic Front for Jihad on the Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."
10. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize enemies of God."
11. Since 1989, members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE: CONSPIRACY

12. Salim Ahmed Hamdan (a/k/a Salim Ahmad Hamdan, a/k/a Salem Ahmed Salem Hamdan, a/k/a Saqr al Jadawy, a/k/a Saqr al Jaddawi, Khalid bin Abdallah, a/k/a Khalid w'l'd Abdallah, hereinafter "Hamdan"), in Afghanistan, Pakistan, Yemen and other countries, from on or about February 1996 to on or about November 24, 2001, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden, Saif al Adel, Dr. Ayman al Zawahari (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.
13. In furtherance of this enterprise and conspiracy, Hamdan and other members or associates of al Qaida committed the following overt acts:

RE 7

- a. In 1996, Hamdan met with Usama bin Laden in Qandahar, Afghanistan and ultimately became a bodyguard and personal driver for Usama bin Laden. Hamdan served in this capacity until his capture in November of 2001. Based on his contact with Usama bin Laden and members or associates of al Qaida during this period, Hamdan believed that Usama bin Laden and his associates were involved in the attacks on the U.S Embassies in Kenya and Tanzania in August 1998, the attack on the USS COLE in October 2000, and the attacks on the United States on September 11, 2001.
- b. From 1996 through 2001, Hamdan:
- 1) delivered weapons, ammunition or other supplies to al Qaida members and associates;
 - 2) picked up weapons at Taliban warehouses for al Qaida use and delivered them directly to Saif al Adel, the head of al Qaida's security committee, in Qandahar, Afghanistan;
 - 3) purchased or ensured that Toyota Hi Lux trucks were available for use by the Usama bin Laden bodyguard unit tasked with protecting and providing physical security for Usama bin Laden; and
 - 4) served as a driver for Usama bin Laden and other high ranking al Qaida members and associates. At the time of the al Qaida sponsored attacks on the U.S Embassies in Tanzania and Kenya in August of 1998, and the attacks on the United States on September 11, 2001, Hamdan served as a driver in a convoy of three to nine vehicles in which Usama bin Laden and others were transported to various areas in Afghanistan. Such convoys were utilized to ensure the safety of Usama bin Laden and the others. Bodyguards in these convoys were armed with Kalishnikov rifles, rocket propelled grenades, hand-held radios and handguns.
- c. On divers occasions between 1996 and November of 2001, Hamdan drove or accompanied Usama bin Laden to various al Qaida-sponsored training camps, press conferences, or lectures. During these trips, Usama bin Laden would give speeches in which he would encourage others to conduct "martyr missions" (meaning an attack wherein one would kill himself as well as the targets of the attack) against the Americans, to engage in war against the Americans, and to drive the "infidels" out of the Arabian Peninsula.
- d. Between 1996 and November of 2001, Hamdan, on divers occasions received training on rifles, handguns and machine guns at the al Qaida-sponsored al Farouq camp in Afghanistan.

Biographical Summary

Peter E. Brownback III

[REDACTED] with a Bachelors
of Arts in International Affairs.

Received a Regular Army commission as an infantry officer in June 1969. After initial officer training, assigned as a platoon leader in 3/325 PIR, 82d Abn Div, Fort Bragg, NC from October 1969 to February 1970.

Vietnam service from June 1970 - June 1971 as an infantry platoon leader, armored cavalry platoon leader, and battalion S-1, all with the 173d Airborne Brigade.

Served with 5th Special Forces Group at FBNC from June 71 to February 1973 as an A Detachment Commander and Battalion S-3.

Infantry Officer Advanced Course -- June 1973 - May 1974.

Funded Legal Education Program student at [REDACTED]
[REDACTED] Summers at Fort Lee working
as assistant trial and assistant defense counsel. Admitted to
Virginia Bar, June 1977.

Assigned to Office of the Staff Judge Advocate, 82d Airborne
Division, FBNC, 1977-1980. Trial Counsel, Chief Administrative
Law, Chief Military Justice.

Senior Defense Counsel, Fort Meade, MD. 1980-81.

Operations Officer, US Army Trial Defense Service, Falls Church,
VA. 1981-84.

Legal Advisor/Legal Instructor, USAJFK Center for Special Warfare,
FBNC, 1984-85.

Legal Advisor, Joint Special Operations Command, FBNC, 1985-88.

Senior Military Judge, Mannheim, FRG, 1988-1991.

Director of Legal Operations, JSOC, FBNC, Jan 91 - Apr 91.

Staff Judge Advocate, 22d SUPCOM/ARCENT Forward, Dhahran, KSA, May
91 - May 92.

Chief Circuit Judge, 2d Judicial Circuit, FBNC, 1992 - 1996.

Chief Circuit Judge, 5th Judicial Circuit, Mannheim, FRG, 1996 - 1999.

Entered on the retired rolls on 1 July 1999.

Recalled to active duty on 14 July 2004.

Review Exhibit 8

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AWARDS: Combat Infantryman's Badge, Special Forces Tab, Ranger Tab, Master Parachutist Badge, DSM, LOM x 3, BSM x 5, MSM x 2, JSCM x 2, ARCOM x 2, AAM, JMUA x 2, NDSM, VSM, SWABS, HSM, RVNGCUC, RVNCAMU, KUKULISM

PERSONAL: [REDACTED]
[REDACTED]
[REDACTED]

**Voir Dire Question Prepared by Presiding Officer, COL Peter E. Brownback
(Taken from the Draft Trial Guide.)**

1. I do not know any accused whose case has been referred to the Commission.
2. I do not know any person named in any of the charges.
3. Of the names of witness I have seen so far, I do not recognize any of their names.
4. I do not have any prior knowledge of the facts or events in this case that will make me unable to serve impartially.
5. I do not know, and have no command relationship with, any other member.
6. I believe that I can vote fairly and impartially notwithstanding a difference in rank with other member. I will not use my rank to influence any other member.
7. I have not had any dealings with any of the parties to the trial, to include counsel for both sides, that might affect my performance of duty as a Commission member in any way.
8. I have not had any prior experience, either personal or related to my military duties, that I believe that would interfere with my ability to fairly and justly decide this case.
9. No family member, relative, or close friend that I am aware of was the victim of the events of 9-11, and has not been the victim of any alleged terrorist act. I have been told that a former Judge Advocate General's Corps officer was on one of the planes which hit the World Trade Center. This officer was assigned to Fort Bragg at some time during the period 1984 to 1988, while I was assigned there. I do not recall the last time I saw the officer, nor do I recall his name. He was not assigned to the same unit(s) to which I was assigned, although we met, I feel certain, at one or more of the judge advocate functions on base. [REDACTED]
[REDACTED]
10. I have seen and heard general media reporting about the events of 9-11, al Qaida, Usama Bin Laden, and terrorism on broadcast TV and the various newspapers. Nothing I have seen or read will have any effect on my ability to perform the duties as a Commission member fairly and impartially.
11. I promise as a Commission Member that I will keep an open mind regarding the verdict until all the evidence is in.
12. I know and respect that the accused is presumed innocent and this presumption remains unless his guilt is established beyond a reasonable doubt. I know and respect that the burden to establish the guilt of the accused is on the prosecution. I agree to be guided by and follow these principles in deciding this case.
13. I have nothing of either a personal or professional nature that would cause me to be unable to give my full attention to these proceedings throughout the trial.

Review Exhibit 8

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14. I am not aware of any matter that might raise a question concerning my participation in this trial as a Commission member.

Peter E. Brownback III
Colonel, USA

Presiding Officer Voir Dire Addendum - Relationship with Other Personnel

a. Mr. Haynes: I believe that I once met the General Counsel at the Army's Judge Advocate General's School in 1996 or 1997 as part of an organized run. We exchanged perhaps ten minutes worth of casual chit-chat during the run. Other than that, I have had no contact with Mr. Haynes.

b. Mr. Altenburg:

1. I first met (then) CPT Altenburg in the period 1977-78, while he was assigned to Fort Bragg. My only specific recollection of talking to him was when we discussed utilization of courtrooms to try cases.

2. To the best of my knowledge and belief, I did not see or talk to Mr. Altenburg again until sometime in the spring of 1989 at the Judge Advocate Ball in Heidelberg. Later, in November-December 1990, (then) LTC Altenburg obtained Desert Camouflage Uniforms for COL Wayne Iskra and me so that we would be properly outfitted for trials in Saudi Arabia.

3. During the period 1992 to 1995, (then) COL Altenburg was the Staff Judge Advocate, XVIII Airborne Corps and Fort Bragg while I was the Chief Circuit Judge, 2nd Judicial Circuit, with duty station at Fort Bragg. Our offices were in the same building.

[REDACTED] During this period, Mr. Altenburg and I became friends. We saw each other about twice a week and sometimes more than that. We generally attended all of the SJA social functions. He and his wife (and children - depending upon which of his children were in residence at the time) had dinner at our house at least three times in the three years we served at Fort Bragg. I attended several social functions at his quarters on post. Though he was a convening authority and I was a trial judge, we were both disciplined enough to not discuss cases. I am sure there were times when he was not pleased with my rulings.

4. From summer 1995 to summer 1996 when Mr. Altenburg was in Washington and I at Fort Bragg, he and I probably talked on the telephone three or four times. I believe that he stayed at my house one night during a TDY to Fort Bragg (but I am not certain.).

5. During the period June 1996 to May 1999, I was stationed at Mannheim, Germany and Mr. Altenburg was in Washington. Other than the World-Wide JAG Conferences in October of 1996, 1997, and 1998, I did not see nor talk to MG Altenburg except once -- in May of 1997, I attended a farewell dinner hosted by MG Altenburg for COL John Smith. In May 1999, MG Altenburg presided over my retirement ceremony at The Judge Advocate General's School and was a primary speaker at a "roast" in my honor that evening.

Review Exhibit

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6. Since my retirement from the Army on 1 July 1999, Mr. Altenburg has never been to our house and we have never been to his. From the time of my retirement until the week of 12 July 2004, I have had the occasion to speak to him on the phone about five to ten times. I had two meetings or personal contacts with him during that period. First, in July or August 2001 when I was a primary speaker at a "roast" in MG Altenburg's honor at Fort Belvoir upon the occasion of his retirement. Second, in November (I believe.) 2002, I attended his son's wedding in Orlando, Florida.

7. I sent him an email in December 2003 when he was appointed as the Appointing Authority to congratulate him. I also sent him an email in the spring of 2004 when I heard that he had named a Presiding Officer. Sometime in the spring of 2004, I called his house to speak to his wife. After we talked, she handed the phone to Mr. Altenburg. He explained that setting up the office and office procedures was tough. I suggested that he hire a former JA Warrant Officer whom we both knew.

8. To the best of my memory, Mr. Altenburg and I have never discussed anything about the Commissions or how they should function. Without doubt, we have never discussed any case specifically or any of the cases in general. I am certain that since being appointed a Presiding Officer we have had no discussions about my duties or the Commission Trials.

c. BG Hemingway: I had never met, talked to, or otherwise communicated with BG Hemingway until I reported on 14 July 2004.

d. Members: I have never met or talked to any of the other members of the commission. I have emailed instructions to all of them and received email receipts from all of them. A copy of what I sent to the members was provided to all counsel.

18 August 2004

Subject: Questionnaire #2 - Presiding Officer Voir Dire

1. I have received questions from counsel in Al Bahlul, Hamden, and Hicks. Many of the questions are the same or so nearly the same as to make no difference. I am answering these questions by this memorandum.
2. I refer all counsel to MCO #1, para 6B(1) and (2) - the commission is to provide a full and fair trial, impartially and expeditiously. Further, MCI # 8, para 3A(2), states that questioning of the members, to include the Presiding Officer, shall be narrowly focused on issues pertaining to whether good cause may exist for removal of any member.
3. Professional Background --
 - a. I have served in close ground combat only in Vietnam - where I was a rifle platoon leader and an armored cavalry platoon leader. I do not remember having any occasion to deal with enemy prisoners - either by capturing them or being involved in trying them or questioning them. However, I did work with former Viet Cong who had come over to the ARVN.
 - b. During my time as an infantry officer and a judge advocate, I attended many courses - some of which focused on the law of war and international law. I do not recall the where/when's for these courses. I taught various aspects of international law and law of war at the JFK Special Warfare Center for a year. To the best of my knowledge, I have not attended any courses focusing on LOAC or IL since 1984/85. However, during various presentations at general courses, I may have had some exposure to these subjects.
 - c. I have not received any specialized training, formal or informal, on Al Qaeda, the Taliban, Islamic Fundamentalism, or detainee operations. I have had the occasion to read newspaper and news magazine accounts of various aspects of the topics above. I also have read some articles published in the Army War College journal and the Military Law Review. Additionally, I have read numerous articles on various topics while surfing the web.
 - d. I am generally aware of the conduct of operations in Afghanistan and Iraq. I am interested in such operations. I have had occasion to look at the DOD website on Military Commissions. I have not seen any of the data or articles on detainee operations.
 - e. I have not written for publication or spoken publicly about any of the topics in paragraph 3c above.
 - f. I am and have been an associate member of the Virginia State Bar since 1977. I have never practiced law in the civilian sector.

4. Personal Background:

Review Exhibit

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a. I was raised as a Christian. I do not attend church regularly. I have no antipathy towards Islam, or any of the other major religions. My knowledge of Islam is based primarily upon my readings and my dealings with Saudis, Kuwaitis, and others during my tour in Saudi Arabia in 1991-92. I am not an expert in the area of Islam, although I have some knowledge. I do own a Qur-An, but I do not profess to be a student of the Qur-An.

b. I entered onto the retired rolls on 1 July 1999. I intended to be retired. However, I soon discovered that I was slightly bored. Consequently, at the urging of my wife, I took several part-time jobs. These included being an enumerator for the 2000 Census, a safety person for beach renewal operations, an instructor for an SAT prep course, and an instructor at a local college. I enjoyed all of the jobs and I regretted having to quit two of them upon my recall to active duty.

c. My hearing is within deployment standards. I do not like to have people mumble - I prefer that they speak with a command voice. There is no impairment.

d. **Caveat - see 4e, below.** I belong to several military professional organizations and to various social organizations. None of them is political in nature. I do not attend meetings.

e. I do belong to a local community organization which supports various propositions involving local city management and zoning. It is political only in the sense that it wants voters to vote in accordance with its recommendations - most of which are simply anti-over-development. I have attended at least three of its meetings when the topic was one of interest to me.

f. I am registered to vote. My Voter Registration Card shows NPA in the Party block. I have not campaigned for anyone.

5. Effect of 9/11 and other events:

a. See Questionnaire #1 for the only person I knew who was killed on 9/11.

b. I knew and know many people in the Pentagon. I did not have any personal friends who were killed or injured there; however, I did have friends who were in the building when the plane hit.

c. I have many friends and others who have been stationed in Afghanistan and Iraq. I am aware of the impact of war upon soldiers and their families.

d. There was no specific impact of 9/11 and related events upon me or my family.

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6. Mr. Hodges:

a. I first became aware of Keith Hodges in 1980-81. I was the Senior Defense Counsel at Fort Meade, MD. The post stockade served many posts along the east coast. One of those posts was Fort Eustis, VA, where CPT Hodges was a prosecutor. He was the lead prosecutor on a murder case - I became involved in the case through my dealings with the DC at Eustis.

b. I next saw LTC Hodges when he was the Regional Defense Counsel in Stuttgart, Germany and I was one of the military judges at Mannheim. We had numerous professional contacts and we may have been at two or three social functions together.

c. In 1992, I became the Chief Circuit Judge, 2d Judicial Circuit, Fort Bragg, NC. One of the Circuit Judges who worked for me was LTC (later COL) Hodges. We worked closely together - via telephone and electronic bulletin board (precursor to email) - until his departure for Fort Hood in 1995. During this period, I only saw him at judicial training functions and on one occasion when I promoted him to Colonel.

d. From 1995 to 1996, COL Hodges and I talked and exchanged emails routinely on various matters. We worked on the Benchbook together and we helped each other with various case-related problems. I saw COL Hodges once, during a judicial training function.

e. From 1996 until my retirement in 1999, COL Hodges and I continued to exchange ideas, suggestions, instructions, and the like by email. I saw him three times at judicial training functions.

f. Upon my retirement in 1999, COL Hodges and I had few occasions to exchange email or telephone calls while he was at Fort Hood. However, after he retired in 2000, he visited us on several occasions while [REDACTED]

When Mr. Hodges would come across a criminal law case which he thought would interest me, he would forward it to me.

g. During the period after the announcement of the Military Commissions in 2001, Mr. Hodges and I discussed the commissions on at least one occasion. He knew that I had put my name in for consideration. On 29 June 2004, I received an email from LTC [REDACTED] at OMC. In it he stated that the Appointing Authority was considering hiring a Legal Advisor to the Presiding Officer and asked if I had any recommendations. I immediately gave him Mr. Hodges' name, because:

- 1) I was personally familiar with Mr. Hodges' work and work ethic.
- 2) I was personally familiar with Mr. Hodges' knowledge of criminal law and procedure.
- 3) I was personally familiar with Mr. Hodges' ability to write, edit, and publish procedural matters.

4) I was aware of Mr. Hodges' performance as a military judge, both the highs and the lows.

LTC [REDACTED] asked me for Mr. Hodges' contact information and I gave it to him. Subsequently, the Appointing Authority, UP MCO #1, executed a detailing agreement with the Federal Law Enforcement Training Center - whereby Mr. Hodges would be detailed to OMC for a year. While Mr. Hodges is paid by DHS, his employer is OMC. During the period of the detail, Mr. Hodges' primary focus is OMC. Mr. Hodges has distributed a copy of the detailing agreement to all counsel.

h. Once LTC [REDACTED] and Mr. Hodges talked, I talked to Mr. Hodges and pointed out some of the problem areas in working with the commissions. He eventually decided to accept the detail.

i. Since 15 July 2004, Mr. Hodges has been part of the procedural preparation for the proceedings before the commissions. He has written procedures, written emails, written memoranda, and prepared various drafts. All of this has been done under my supervision. Mr. Hodges has also prepared memoranda and drafts which he forwarded to the Appointing Authority concerning procedural aspects of the commissions. He did this with my knowledge and consent, but acting for the Appointing Authority. To my knowledge, Mr. Hodges has had many communications with OMC personnel - most by email. I am not aware of any communications between Mr. Hodges and any members of OGC. All of Mr. Hodges' communications with OMC personnel were in the area of procedural and logistic preparation for commission proceedings. I believe that it is entirely appropriate for Mr. Hodges to discuss and make recommendations for procedural changes or structure so that the commission process may function efficiently and expeditiously.

j. Mr. Hodges and I have never discussed the substance of any of the cases currently referred to the commission for trial. We have never discussed MCI #2. All of our discussions, efforts, and work have been focused on the procedural requirements to get cases before the commission.

k. I have never had an *ex parte* discussion with Mr. Hodges concerning any of the cases referred to the commission.

7. Selection as Presiding Officer:

a. Sometime in the spring of 2002, I was told by someone that the Presiding Officers of the Military Commissions could be retired officers who were recalled to active duty. I discussed this with COL [REDACTED] Chief Trial Judge.

b. In January 2003, I got a call from OCTJ, informing that if I wanted to put my name in for PO, I had to send in a statement. I did and I did.

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c. In December 2003, I read that MG (Ret.) Altenburg had been named the Appointing Authority. In January I received a call from OCTJ wanting to know if I, among others, was still interested. I was.

d. On 24 or 25 June 2004, I got a call from LTC [REDACTED] at OMC. He wanted to know if I was still interested. I was. He told me that an announcement would be made quickly. On 28 June I got four phone messages that some PAO wanted to read me a press release so that I could okay it. I never found the PAO. On 29 June 2004, the announcement was made.

e. MG (Ret.) Altenburg knew that I was interested in being on one of the commissions.

e. That is all I know about the selection process.

8. Military Commissions:

a. The Presiding Officer has specifically designated roles and duties under MCO #1 and the MCI's. Those roles and duties are different, in many ways, from those of the other members of the commission. In some areas, MCO #1 and the MCI's give the Presiding Officer the authority to act for the commission without the formal assembly of the full commission. Under the President's Military Order, the Presiding Officer can be overruled by a majority of the commission in certain areas. For a full explanation of the Presiding Officer's powers, see MCO #1 and the MCI's. As the only member of the commission who is a judge advocate, I will tell the commission what I believe the law to be. However, the President's Military Order states that the commission will decide all questions of law and fact. As with all matters of law, I invite counsel to provide motions and briefs so that I may become better informed - I note that there have been no motions or notice of motions to date on any legal topics.

b. Addressing a specific question, I did in fact state: "Perhaps a better way of looking at the matter is to say that I have authority to order those things which I order done." I then went on to say that this was based on my interpretation of the law and that my interpretation would be the one that counted "until superior competent authority (The President, The Secretary of Defense, The General Counsel of the Department of Defense, The Appointing Authority) issues directives stating that what I am doing is incorrect." Based on a directive from the Appointing Authority, I did not and will not hold commission sessions without the full commission. This directive did change my opinion concerning my ability to hold sessions without the full commission.

c. Based on my interpretation of the MCO and MCI's, the standard for whether or not a member should sit is whether there is good cause to believe that the member can not be fair and impartial and provide a full and fair trial. The determination as to whether there is good cause to relieve a member is made by the Appointing Authority. If I believe that there is good cause to relieve me or any other member, I am required to forward that information to the Appointing Authority for his decision.

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d. I have had the occasion to review various material about military commissions. The commentary on commissions and the legality thereof is about what one would expect - a lot pro, a lot con. The commentary ranges from the legality of the commissions to the structure of the commissions to the law governing the establishment and operation of the commissions. Until these areas have been thoroughly briefed by counsel, I reserve my opinion.

e. Any service member has the right and duty to disobey an unlawful order or general order or regulation. However, the standard under Article 92 is quite high. Obviously, if the order or regulation is patently illegal, the source of the order or regulation does not mitigate the illegality.

f. Counsel are encouraged to provide briefs on the issue of "declaring an order or regulation" unlawful by the Presiding Officer of a commission. I am not prepared to address the issue at this time.

9. Personal Knowledge of Cases:

a. I have read the charge sheets in all four cases which are presently referred to the commission for trial. That is all that I have read or know about any of the cases. I have not seen the Presidential Determinations in the cases. I have not discussed the facts of the cases with anyone - either in my personal or professional capacity. Until I received the charge sheets, I had never heard the names of any of the defendants.

b. If the Prosecution proves all of the elements of an offense beyond a reasonable doubt, then a vote for a guilty finding would be appropriate. If not, then a vote for a not guilty finding would be appropriate.

c. As to the responsibility for the acts of 9/11 and others, the only knowledge I have of the acts and the perpetrators is open news media. If one were to believe what one reads, then it would appear that members of Al Qaeda were responsible for the attacks. I have no opinion as to the actions of specific individuals.

10. General:

a. My participation as a member and Presiding Officer in this commission will have an impact on my personal life. It will have no impact on my professional life - I do not have a professional life. Once these proceedings are finished, I will retire again.

b. Media interest in the case will not have an impact on how I perform my duties.

c. Other than memoranda and emails from OMC - on which counsel were cc'd, I have received no instructions, hints, suggestions, or any other form of communication from anyone in any governmental position (to include OMC and OGC) concerning what I should do as a Presiding Officer in these proceedings. Based on my personal and

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professional knowledge of Mr. Altenburg, my belief is that he wants to have these cases tried fully and fairly. I have not discussed my role as Presiding Officer with Mr. Altenburg at all.

d. I am not aware of any matter which might cause a reasonable person to believe that I could not act in a fair and impartial manner in these proceedings.

Peter E. Brownback III
COL, JA
Presiding Officer

Instructions given to members prior to arriving at GTMO listed in order given.

All instructions sent to members by COL Brownback.

Page 1: Sent by email.

Pages 2 and 3: All members except [REDACTED]. Printed and given to members at Andrews AFB and returned to COL Brownback.

Pages 4 and 5: Printed and given to [REDACTED] by LN1 [REDACTED] at Andrews. (Same as above except noting the signed document to go to LN1 [REDACTED] and not COL Brownback.)

Page 6: Email to all members.

Keith Hodges
Assistant to the Presiding Officers

Instructions to Prospective Commission Members

I am Colonel Peter E. Brownback, III. You and I have been detailed to be members on a Military Commission concerning the trial of certain individuals now being detained at US Naval Station, Guantanamo Bay, Cuba. I have also been detailed as the Presiding Officer of the Military Commission.

1. Each of you will respond by email to the undersigned acknowledging receipt of these instructions. If you prefer to use a different email address for future communications among us, please so advise me at the email address above.

2. Due to the publicity which these cases may have already received, and recognizing the probability of further publicity, each of you is instructed as follows:

a. As a prospective member of the Military Commission which will try a case, it will be your duty to determine the guilt or innocence of the accused as to the charges which have been referred to the Commission for trial. Under the law, the accused is presumed to be innocent of the charges against him. Neither the fact that the charges have been prepared by the government nor the fact that they have been referred to the Commission for trial warrants any inference of his guilt. Your determination as to his guilt or innocence must be based upon the entire evidence in the case as presented to you in open court and upon the law as you will be instructed. Thus, it is important that you keep an open mind and not form or express any opinions on the case until all of the evidence and the applicable law has been presented to you.

b. A trial by Military Commission includes the determination of the ability of each member to sit as a member. As a prospective member, you may be questioned in open session by counsel for either side or by myself to determine whether or not you should serve. You may also receive a questionnaire and other documents from me to prepare prior to trial. Trial by Military Commission requires members who approach the case with an open mind and keep an open mind until all of the evidence and law has been presented and the Commission closes to deliberate. A Commission member should be as free as humanly possible from any preconceived ideas as to the facts or the law. From the date of receipt of these instructions, you will keep a completely open mind and wait until all of the evidence is presented in open session and the Commission has retired to deliberate before you discuss the facts of this case with anyone, including other Commission members.

c. Due to the previous publicity about this case and the probability of further publicity, you are instructed that you must not listen to, look at, or read any accounts of alleged incidents involving these cases. You may not consult any source, written or otherwise, as to matters involved in such alleged incidents. You may not listen to, look at, or read any accounts of any proceedings in these cases. You may not discuss these cases with anyone, and if anyone attempts to discuss these cases with you, you must forbid them to do so and report the occurrence to me. You may not discuss, other than as required to inform your military superiors of your duty status, your detail to this Commission as a prospective member with anyone.

3. I do not expect that you will be involved in any proceedings until September at the very earliest.

Peter E. Brownback III
COL, JA
Presiding Officer

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Fellow members of the Commission. Please read these instructions immediately, sign the bottom, and return the signed copy to me.

Your duty as a potential Commission member does not begin until Monday morning at the earliest. The necessary logistical arrangements to bring members of the Commission, the prosecution, the defense, and support personnel to Guantanamo will bring us into close proximity while traveling to Guantanamo and in-processing there. Until such time as you are advised by me that you may discuss matters involved in this case, you may not discuss with anyone – not even among yourselves – anything about the Commission trials or the cases that may come before it.

After we arrive later today, there will be in-processing and you will be taken to your billets. An assigned bailiff will be your driver. On Saturday, we have arranged a private fence line tour. On Sunday, we have arranged a private boat cruise. Enjoy the NEX, the sites, the varied eating establishments, and the broad variety of MWR activities. You will also note that each of your rooms has cable TV.

Do not at any time visit or attempt to visit any of the detainee areas. The bailiff has been instructed not to take you in the area where those facilities are located. Should you see members of the media, avoid them. If approached by the media, walk away and do not even listen to question they may ask. If confronted by the media, refuse to speak to them and refer them to a Public Affairs representative. The same rules apply to official Public Affairs representatives, except that they should be referred to Mr. Hodges.

Mr. Keith Hodges is the Assistant to the Presiding Officer and is responsible to me for making logistical and administrative arrangements. You may think of him as a Clerk of the Commission. The Commission will also be assigned a bailiff. Mr. Hodges and the bailiff will work with you on strictly administrative and logistical matters. Because Mr. Hodges and the Bailiff are not members of the Commission, you must strictly observe the following rules:

a. You may not ever discuss any case, or the evidence offered in any case, with Mr. Hodges or the bailiff.

b. You may not ever discuss any case, or the evidence offered in any case, in the presence of the bailiff or Mr. Hodges

c. You may never seek from, or express an opinion to, Mr. Hodges or the bailiff concerning any case or the evidence offered in a case at any time.

b. Neither the bailiff nor Mr. Hodges may enter the deliberation room when closed sessions are in progress. The exception to this rule is that either Mr. Hodges or the bailiff may need to enter the deliberation room during a closed session on an administrative mission – such as to provide paper and pens. In such a case, they will knock at the deliberation room door and announce their presence. Before being allowed to enter, all discussions must stop.

Be cautious about any contact you have with members of the prosecution, defense, security personnel, or the administrative staff, as any such contact could be misinterpreted. Do not go into the defense area or the prosecution area or upstairs in the Commissions building. If outside the building and you see any detainee or detainee security personnel, immediately return to the building. The best advice I can give you is to stay together as a group, or by yourself, while at Guantanamo and do not discuss the Commission or any of the cases until you are instructed that you may do so.

You are reminded of the instructions I provided you before by email, and a copy of those instructions are attached if you wish to refresh your memory.

The bailiff will pick you up and drive you to breakfast at on Monday morning at a time to be determined later. The uniform is Class B - in Army terminology. For Marines, it is Summer Service C. For other services, I will be wearing a short-sleeve open neck green shirt with no tie and with badges but not decorations. Choose your uniform accordingly.

I have received and read the above instructions:

Rank and Last Name: _____

Signature

Date

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Fellow members of the Commission. Please read these instructions immediately, sign the bottom, and return the signed copy to me.

Your duty as a potential Commission member does not begin until Monday morning at the earliest. The necessary logistical arrangements to bring members of the Commission, the prosecution, the defense, the prosecution, and support personnel to Guantanamo will bring us into close proximity while traveling to Guantanamo and in-processing there. Until such time as you are advised by me that you may discuss matters involved in this case, you may not discuss with anyone – not even among yourselves – anything about the Commission trials or the cases that may come before it.

After we arrive later today, there will be in-processing and you will be taken to your billets. An assigned bailiff will be your driver. On Saturday, we have arranged a private fence line tour. On Sunday, we have arranged a private boat cruise. Enjoy the NEX, the sites, the varied eating establishments, and the broad variety of MWR activities. You will also note that each of your rooms have cable TV.

Do not at any time visit or attempt to visit any of the detainee areas. The bailiff has been instructed not to take you in the area where those facilities are located. Should you see members of the media, avoid them. If approached by the media, walk away and do not even listen to question they may ask. If confronted by the media, refuse to speak to them and refer them to a Public Affairs representative. The same rules apply to official Public Affairs representatives, except that they should be referred to Mr. Hodges.

Mr. Keith Hodges is the Assistant to the Presiding Officer and is responsible to me for making logistical and administrative arrangements. You may think of him as a Clerk of the Commission. The Commission will also be assigned a bailiff. Mr. Hodges and the bailiff will work with you on strictly administrative and logistical matters. Because Mr. Hodges and the Bailiff are not members of the Commission, you must strictly observe the following rules:

- a. You may not ever discuss any case, or the evidence offered in any case, with Mr. Hodges or the bailiff.
- b. You may not ever discuss any case, or the evidence offered in any case, in the presence of the bailiff or Mr. Hodges
- c. You may never seek from, or express an opinion to, Mr. Hodges or the bailiff concerning any case or the evidence offered in a case at any time.
- b. Neither the bailiff nor Mr. Hodges may enter the deliberation room when closed sessions are in progress. The exception to this rule is that either Mr. Hodges or the bailiff may need to enter the deliberation room during a closed session on an administrative mission – such as to provide paper and pens. In such a case, they will knock at the deliberation room door and announce their presence. Before being allowed to enter, all discussions must stop.

Be cautious about any contact you have with members of the prosecution, defense, security personnel, or the administrative staff as any such contact could be misinterpreted. Do not go into the defense area or upstairs in the Commissions building. If outside the building and you see any detainee or detainee security personnel, immediately return to the building. The best advice I can give you is to stay together as a group, or by yourself, while at Guantanamo and do not think about or discuss the Commission or any of the cases until instructed you may do so.

You are reminded of the instructions I provided you before by email, and a copy of those instructions are attached if you wish to refresh your memory.

The bailiff will pick you up and drive you to breakfast at on Monday morning at a time to be determined later. The uniform is Class B.

Original Signed:

Peter E. Brownback
COL, JA, USA
Presiding Officer

I have received and read the above instructions: (After you sign, please return this document to [REDACTED])

Rank and Last Name: _____

Signature

Date

Administrative items for members.

1. It is hot in GTMO, and on Saturday, Sunday, during travel, and in the evenings, casual clothing (to include shorts at GTMO) is welcome and expected. There are plenty of swimming and MWR activities (bathing suit, running gear, etc.)
2. You will probably be in court 4 days, so bring sufficient class Bs. A washer, dryer, and iron are available in the hooches you are billeted in.
3. A full base exchange and ATMs are available, and there are many different places to eat. But, if you have a favorite snack or brand of something, bring it.
4. Your cell phone will not work here. There is a class A (commercial) line in the deliberation room for your use. There is also a large fridge there as well as, of course, a coffee pot.
5. When you arrive to catch the aircraft to GTMO on Friday, please avoid talking to the other passengers until you are given some special instructions to read.
6. In the deliberation room, we have set up a computer so you can check web-based email. (You will not be able to connect to your organization's email.) However, we have also established email accounts for each of you with a 25 MB storage limit. Those account names are below, and have been activated. You will get the passwords when you in-process the Commissions building on Monday. If you wish, you may have email forwarded to the account, or another web base account. NOTE: The chances are that your military email network will NOT allow you to forward email outside their network unless you make special arrangements. Mr. Hodges advises this CAN be done, it is a matter of talking the LAN administrator into doing it. Otherwise, you will have to have a proxy send emails to your new GTMO account.

(Email addresses of members redacted)

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L

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

)
) DEFENSE MOTION:
) FOR DISMISSAL (UNLAWFUL
) COMMAND INFLUENCE)

)
)
)
) August 23, 2004

1. Timeliness. This motion is filed in a timely manner, as unlawful command influence should be brought to a tribunal's attention at the earliest session after the influence is discovered.

2. Relief Sought. Defense respectfully requests that the Appointing Authority be removed from further participation in this military commission. Further, Defense requests that the proceedings against Mr. Hamdan be dismissed, and the matter be transferred to a substitute Appointing Authority for determination for any future action which he or she deems appropriate, finally, we request that the Legal Advisor to the Appointing authority be prohibited from future involvement in any military commission proceedings against Mr. Hamdan.

3. Facts: (Source of facts provided in parentheses).

a. The Legal Advisor to the Appointing Authority is an active duty Air Force judge advocate assigned to the Appointing Authority's staff as his legal advisor. *See* Military Commission Instruction (MCO) No. 6, paragraph 3.A.(2) ("Legal Advisor to Appointing Authority: The Legal Advisor to Appointing Authority shall report to the Appointing Authority.").

b. On August 11, 2004, the legal Advisor to the Appointing Authority issued a memorandum to the Presiding Officer on the subject of "Presence of Members and Alternate Members at Military Sessions" (hereinafter Memorandum). The Memorandum was apparently prompted by discussions between the Presiding Officer, defense counsel, and prosecutors regarding the questions of Presiding Officer's power to act outside the presence of the other members. (Legal Advisor to Appointing Authority memo of 11 August 2004)

c. Prior to issuance of the Memorandum the Presiding Officer had stated "I have the authority to act for the Commission without the formal assembly of the whole Commission." (Electronic message of 28 July 2004 from Presiding Officer to Chief Defense Counsel).

d. Prior to the issuance of the Memorandum the Presiding Officer intended to proceed with sessions of the commission where only he would be present. (Original trial script).

e. Subsequent to the issuance of the Memorandum the Presiding Officer decided that the sessions would include the other commission members. (Revised trial script).

f. During the discussion between the Presiding Officer and counsel regarding his power to act unilaterally, the Presiding Officer stated that he would change his opinion if "superior competent authority (The President, The Secretary of Defense, The General Counsel of the Department of Defense, The Appointing Authority) issues directives stating that what I am doing

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is incorrect.” (Electronic message of 28 July 2004 from Presiding Officer to Chief Defense Counsel).

g. Subsequent to the issuance of the Memorandum the Presiding Officer stated, “[b]ased on a directive from the Appointing Authority, I did not and will not hold commission sessions without the full commission.”

5. Law Supporting the Request for the Relief Sought

Article 37, U.C.M.J., 10 U.S.C. §837 prohibits attempts to unlawfully influence military tribunals. Specifically, “No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any military tribunal or any member thereof, in reaching the findings or sentence in any case”

It is well established that “[u]nlawful command influence is the ‘mortal enemy of military justice.’” (Citation omitted). *United States v. Stoneman*, 57 M.J. 35, 41 (U.S. Ct. App. A. F. 2002) when “command presence in the deliberation room – whether intended by the command or not -- . . . chills the members’ independent judgment,” an accused is denied “a fair and impartial trial.” *United States v. Dugan*, 58 M.J. 253, 259 (U.S. Ct. App. A. F. 2003). Finally, [e]ven if there was no actual unlawful command influence, there may be a question whether the influence of command placed an ‘intolerable strain on public perception of the military justice system.” (Citation omitted). *Stoneman*, 57 M.J. at 42-43.

With respect to legal questions raised during military commissions, the Appointing Authority’s power is limited to interlocutory questions certified by the Presiding Officer. DODDIR 5105.70, section 4.1.6. The Presiding Officer “shall certify all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge.” MCO No. 1, paragraph 4.A(5)(d). Additionally, the Presiding Officer “may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate.”

In no rule, regulation, or instruction is the Appointing Authority given to power to decide legal issues without the issue having been first certified by the Presiding Officer. Similarly, there appears to be no provision allowing the Legal Advisor to the Appointing Authority to take upon himself the role of issuing legal guidance to the Presiding Officer.

Based upon both the chain of events and the statement of the Presiding Officer, it is clear that the Presiding Officer views the Memorandum as a “directive” from the Appointing Authority which is binding on him regarding the legal question of his power to act unilaterally. The problem with this view, however, is that neither the Appointing Authority nor his Legal Advisor should have had any role in deciding this matter. The fact that they did so is evidence of unlawful command influence in violation of Article 37, UCMJ, 10 USC 837.

Disposition of the issue in question could not “effect a termination of proceedings with respect to a charge.” Thus, the Presiding Officer was not required to certify the issue to the Appointing Authority. Further, there is no evidence that the Presiding Officer certified the issue under his discretionary authority. Consequently, it appears that the Appointing Authority took it upon himself to reach down and decide this issue, through his Legal Advisor, despite the fact that the question was not within his sphere of decision-making power. Thus he has exercised his influence via an unauthorized means.

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The Memorandum has fundamentally altered the Presiding Officer's view of his own power, his view of the power of the other commission members, and his view of the relationship between his power and theirs. This alteration must inevitably influence the action of this military tribunal in all respects, including ultimately with regard to findings and sentence.

It is particularly troubling that the unlawful command influence occurred so early in the proceedings against Mr. Hamdan. Indeed, the Appointing Authority reached down to influence the decision makers with respect to the very first substantive legal question presented in the commission -- one which impacts the very structure of the proceedings -- before the first session has even taken place. Even the appearance of such improper influence would be fatal to the proceedings; certainly the actuality of it must be.

6. Documents Attached in Support of this Motion

Electronic message of 28 July 2004 from Presiding Officer to Chief Defense Counsel
Original trial script
Revised trial script
Legal Advisor to Appointing Authority memo of 11 August 2004

7. Oral Argument. Is requested.

8. Legal Authority. The following legal authority has been cited in support of this motion:

United States v. Stoneman, 57 M.J. 35, 41 (U.S. Ct. App. A. F. 2002)
United States v. Dugan, 58 M.J. 253, 259 (U.S. Ct. App. A. F. 2003)
Article 37, UCMJ, 10 USC 837

9. Witnesses/Evidence. BGEN Thomas Hemingway, USAF, Legal Advisor to the Appointing Authority.

10. Additional Information. None.

Attachments:

As stated



CHARLES D SWIFT

DETAILED DEFENSE COUNSEL

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Swift, Charles D LCDR (L)

From: Swift, Charles, LCDR, DoD OGC [REDACTED]
Sent: Monday, August 23, 2004 8:28 AM
To: 'swiftc[REDACTED]'
Subject: FW: Counsel and the Authority of the Presiding Officer

-----Original Message-----

From: Pete Brownback [mailto:[REDACTED]]
Sent: Wednesday, July 28, 2004 22:03
To: Will Gunn Col [REDACTED]
 (Pros) ; JDratel@aol.com; jo[REDACTED]
 [REDACTED] Shaffer, Sharon, LTC, [REDACTED]
Cc: keith - work; keith - home; OMC - Appt Auth; OMC - BG Hemingway; OMC - LTC [REDACTED]
Subject: Counsel and the Authority of the Presiding Officer

Memorandum For: COL Gunn, Chief Defense Counsel 28 July 2004
 Subject: Counsel and the Authority of the Presiding Officer

1. References:

- a. The President's Military Order of 13 November 2001
- b. DOD Military Commission Order No. 1, 21 March 2002
- c. DOD Dir 5105.70, 10 February 2004
- d. DOD Military Commission Instruction 1, 30 April 2003
- e. DOD Military Commission Instruction 3, 30 April 2003
- f. DOD Military Commission Instruction 4, 30 April 2003
- g. DOD Military Commission Instruction 5, 30 April 2003
- h. DOD Military Commission Instruction 6, 30 April 2003
- i. DOD Military Commission Instruction 7, 30 April 2003
- j. DOD Military Commission Instruction 8, 30 April 2003
- k. DOD Military Commission Instruction 9, 16 December 2003
- l. Memorandum, Mr. Hodges to Legal Advisor to the Appointing Authority,
 Subject: Need for MCO Instructions or Decision, 28 July 2004 (Incl 1)

2. It has come to my attention (e.g., see Incl 2 - Email from LCDR Sandul, 28 Jul 04) that certain counsel may be operating under a misapprehension concerning my authority as the Presiding Officer. Please note that this memorandum does not specifically address any case or any counsel - it covers all four of the cases to which I have been detailed and all of the counsel, whether prosecution or defense, detailed to those cases.

3. So that there is no question of my view in these matters, let me state the following:

- a. I have the authority to set, hear, and decide all pretrial matters.
- b. I have the authority to order counsel to perform certain acts.
- c. I have the authority to set motions dates and trial dates.
- d. I have the authority to act for the Commission without the formal assembly of the whole

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Commission.

The above listing is not supposed to be all inclusive. Perhaps a better way of looking at the matter is to say that I have authority to order those things which I order done.

4. I base my view upon my reading and interpretation of the references. (I note that my analysis of the references comports with that contained in reference 11.) I recognize that any one person's interpretation of various documents might be wrong. However, in the cases to which I have been appointed as Presiding Officer, my interpretation is the one that counts:

a) until the cases have been resolved and the cases are reviewed, if necessary, by competent reviewing authority (See reference 1k.). At that time, there will be an opportunity for advocates, for either side, to state that the Presiding Officer was wrong in his interpretation of the references or in his actions based upon those interpretations. If so, competent reviewing authority will determine the remedy, if any. Or,

b) until superior competent authority (The President, The Secretary of Defense, The General Counsel of the Department of Defense, The Appointing Authority) issues directives stating that what I am doing is incorrect.

5. No counsel before the Commission is a competent reviewing authority or a superior competent authority. When I issue an order, counsel are encouraged and required, by myself and their oaths, to tell me that they believe I am acting improperly and to provide me the citations and interpretations which support their beliefs. I will consider such reply. I will then make a decision. If my decision is that my prior order will stand, counsel are required to comply with my order.

6. In this regard, I direct your attention to paragraph 4A(5)(b) of reference 1b. As you stated in an email to the Appointing Authority today,

As you are aware, my primary responsibility as Chief Defense Counsel is to provide professional supervision for the personnel assigned to the Office of the Chief Defense Counsel. As we proceed, I believe that it is critical for individuals involved in this process to stay within their areas of responsibility.

The Chief Defense Counsel, the Chief Prosecutor, the Appointing Authority, all counsel, and myself have varying areas of responsibility. I do not wish to have a case delayed, an accused disadvantaged, or a counsel lost due to a misunderstanding by counsel of my authority. There is plenty of time on appeal, if necessary, to correct any mistake I might make. Once a counsel's objection to an order is on the record (by memorandum, email, or witnessed conversation - to name but a few methods), the counsel must accept and comply with my order or face sanctions, which no one wishes to have happen.

2 Incl: Peter E. Brownback III
as COL, JA
Presiding Officer

CF:
Appointing Authority
Legal Advisor to the Appointing Authority
Chief Prosecutor
All Counsel

Note to COL Gunn/COL Swann.

If I failed to cc any counsel currently detailed to cases, please insure that this email is forwarded to them.

COL Brownback

Initial Session of Military Commission [version 3]
(Presiding Officer, but no other Commission Members, Present)

A. Convening of the Commission without other Members.

PRESIDING OFFICER (PO): Please be seated. This Military Commission is called to order.

PROSECUTOR (PROS): This Military Commission is convened by Appointing Order No. _____ dated _____ (as amended by Appointing Order No. _____, dated _____) copies of which have been furnished to the Presiding Officer, counsel, and the accused, and which will be marked as Review Exhibit (RE) 1 and attached to the record.

PROS: (The following corrections are noted to the Appointing Order(s): _____.)

PROS: The Presidential determination that the accused may be subject to trial by Military Commission has been marked as RE 2 and has been previously shown to the defense. RE 2 is being handed to the Commission SSO for review.

[Upon completion of SSO review]

PROS: RE 2 is being provided to the Presiding Officer and the government requests that this classified exhibit be annexed to the record of trial under seal in accordance with Military Commission Order No. 1.

PROS: The charges have been properly approved by the Appointing Authority and referred to this Commission for trial. The prosecution caused a copy of the charge(s) in English (and _____, the accused's native language) to be served on the accused on _____. The prosecution is ready to proceed in the Commission trial of *United States v. _____*.

PROS: The accused, the Presiding Officer and all detailed counsel are present (and civilian counsel is also present).

PROS: A court reporter has been detailed reporter for this Commission and [(has been previously sworn) (will be sworn at this time.)]

Note: The following oath may be used:

Do you [(solemnly swear) (affirm)] to faithfully and properly perform the duties of [(Commission Member) (Presiding Officer) (Prosecutor) (Defense Counsel) (Court Reporter) (Security Person) (Civilian Defense Counsel) (Interpreter) (Foreign Attorney Consultant) (_____)]

in all Military Commissions to which you are appointed or detailed, (so help you God.)

PROS: Security personnel have been detailed for this Commission and [(have been previously sworn) (will be sworn at this time.)].

PROS: (The interpreter(s) that (has)(have) been detailed for the Commission and [(has/have been previously sworn) (will be sworn at this time.)]

Note: The above reference does not apply to the accused's interpreter, if any.

PO: I have been designated as the Presiding Officer of this Military Commission by the Appointing Authority and have previously been sworn.

B. Accused's Need for an Interpreter.

PO: Before continuing with other preliminary matters, it is necessary for me to inquire into the accused's need for an interpreter.

PO: _____, are you able to understand and speak English?

Accused (ACC:) _____.

PO: (*If the accused indicates he speaks English.*) Do you need the services of an interpreter to follow these proceedings?

Accused (ACC:) _____.

PO: (*If the accused states he does not speak or understand English or desires an interpreter, continue as follows.*) What language do you speak?

Accused (ACC:) _____.

PO: Is there an interpreter with you now in this courtroom who speaks the language that you do? If so, please also tell me the interpreter's name.

Accused (ACC:) _____.

NOTE: If the Accused answers in the negative, the Presiding Officer will cause arrangements to be made for the Accused to have a qualified interpreter.

PO: (To the interpreter): Please identify yourself, tell me if you qualified to interpret into the Accused's language, and whether you have been sworn.

Interpreter: _____

NOTE: If the interpreter has not been sworn, the Prosecutor will issue an oath.

C. Counsel for the Prosecution.

PO: Prosecutor, please state by whom you have been detailed and your qualifications.

PROS: (I) (All members of the prosecution) have been detailed to this Military Commission by the Chief Prosecutor. (I am) (All members of the prosecution are) qualified under Military Commission Order No. 1, Paragraph 4.B and (I) (we) have previously been sworn. (A representative from the Department of Justice, appear(s) as (a) Special Trial Counsel(s)). (I have not) (No member of the prosecution has) acted in any manner, which might tend to disqualify (me) (us) in this proceeding. The detailing document is now being marked as the next Review Exhibit in order.

PROS: [If (an) investigator(s) or similar representative(s) will sit at prosecution table throughout the proceedings] The Prosecution also has sitting at the Prosecution table an (investigator) (assistant) who will assist the Prosecution but will not be representing the Government.

D. Accused's Choice of Counsel.

PO: _____, pursuant to Military Commission Order Number 1, you can be represented by your detailed defense counsel. (He) (She) (They) (is) (are) provided to you at no expense.

You also can request a different military lawyer to represent you. If the person you request is reasonably available, (he)(she) would be appointed to represent you free of charge.

In addition, you may be represented by a qualified civilian lawyer. A civilian lawyer would represent you at no expense to the government. (He) (She) must be a U.S. citizen, admitted to the practice of law in a State, district, territory, or possession of the U.S., or a Federal court, may not have been sanctioned or disciplined for any relevant misconduct, be eligible for a Secret clearance, and agree in writing to comply with the orders, rules, and regulations of Military Commissions.

If a civilian lawyer represents you, your detailed defense counsel will continue to represent you as well and this detailed defense counsel will be permitted to be present during the presentation of all evidence. Do you understand what I have just told you?

ACC: (Response).

PO: Do you have any questions about your right to counsel before this Commission?

ACC: (Response).

PO: Do you desire to be represented by the counsel currently seated at your table and no other counsel?

ACC: (Response).

PO: Military Defense counsel will announce (his) (her) (their) detailing and qualifications.

DETAILED DEFENSE COUNSEL (DDC): (I) (LCDR Charles D. Swift, JAGC, USN) have been detailed to this Military Commission by the Chief Defense Counsel. (I am) qualified under Military Commission Order No. 1, Paragraph 4.C and (I) have previously been sworn. (I have not) acted in any manner that might tend to disqualify (me) in this proceeding. The document detailing counsel is now being marked as the Review Exhibit in order.

CIVILIAN DEFENSE COUNSEL (CDC) [If present]: I am a civilian counsel who has been determined to be qualified for membership in the pool of qualified civilian defense counsel in accordance with section 4(c)(3) of Military Commission Order Number 1. I have transmitted my notice of appearance through the Chief Defense Counsel. I have signed the civilian counsel Agreement to Practice before a Military Commission and I have not acted in any manner that may tend to disqualify me to practice in this proceeding.

PO [If civilian defense counsel present]: Please mark the notice of appearance including the qualification determination as RE _____ and attach it to the record.

PO [If civilian defense counsel present]: The civilian defense counsel will now be sworn. Do you swear or affirm that you will faithfully perform your duties in the Commission now in hearing, so help you God?

CDC [If present]: I do.

DDC: (If others are at the defense table who are not detailed or civilian counsel as indicated above (such as a FAC), they will now be identified, and if necessary, sworn.)

LN1(SW/AW/SCW) Jason E. Kreinhop, USN – paralegal

Dr. Charles P. Schmitz, Translator

PO: All personnel appear to have the requisite qualifications, and all required to be sworn have been sworn.

E. Presentation of Charges.

PO: Prosecutor, please have the charge sheet marked as RE ____ and attach it to the record.

PROS: (Complies).

PO: Defense counsel, have you and the accused previously been provided a copy of the charge(s)?

DC: (Response).

PO: All parties to the trial have been furnished with a copy of the charge(s). The prosecutor will announce the general nature of the charge(s).

PROS: The general nature of the charge(s) in this case is (are)

PO: Does either party want the charge(s) to be read in open court?

PROS: The prosecutor (does)(does not) want the charge(s) read.

DC: The accused (does)(does not) want the charge(s) read.

PO: (The reading will be omitted.) (Prosecutor will read the charge(s).)

F. Questioning of the Presiding Officer.

PO: I have previously provided counsel for both sides a summarized biography, and a list of matters that one would ordinarily expect counsel to ask during a voir dire process, and they will now be marked as the RE next in order. Those documents are true.

PO: Have counsel for both sides previously seen these documents?

PROS/DC: (Respond.)

(**PO:** I have also received questionnaires from (the Prosecution) (the Defense), and (that) (those) questionnaires will now be marked as the RE next in order. My answers to those documents are true.)

PO: Does counsel for either side have any questions of me that are not reflected in the documents just marked as Review Exhibit(s)?

***NOTE:** Further voir dire may be conducted at this point.*

PO: Does counsel for either side challenge me to sit on this Commission?

SECTION I.

INITIAL SESSION THROUGH ENTRY OF PLEA(S)

1-1. ASSEMBLY OF COMMISSION

If not part of the script, explanatory notes are in italics. If part of the script, explanatory notes are in brackets.

Prior to the start of proceedings, the Presiding Officer may order one or more conferences with the parties to consider any such matters as will promote a full and fair trial. Counsel may also request a conference with the Presiding Officer. The purpose of a conference is not to decide or litigate contested issues, but rather to inform the Presiding Officer of any appropriate matters, such as anticipated motions, objections, and pleas. Conferences need not be made a part of the record, but any matters agreed upon shall be included in the record, either orally or in writing. The presence of the accused at any conference is neither required nor proscribed. No admissions made by an accused or his counsel at a conference shall be used against the accused at trial unless the admissions are reduced to writing and signed by the accused and his defense counsel.

If the Presiding Officer decides to conduct an Initial Session of the Military Commission (Presiding Officer, but no other Commission Members, Present) then Appendix A of this script will be used.

Prior to calling the Commission to order, the Presiding Officer will ensure that the court reporter, security personnel, courtroom Senior Security Officer (SSO) and any interpreters have been sworn and briefed on the procedures they are to follow. Additionally, the Presiding Officer will brief the Closed Circuit Television (CCTV) operators on courtroom procedures.

The Presiding Officer also should be prepared to brief the Commission spectators and media on courtroom decorum and procedures to be followed. This briefing may occur in the courtroom just prior to calling the Commission to Order.

Commission Members will be provided a copy of the charge(s) on the day before the Commission begins proceedings. There will be no discussion of the charge(s) by any member with outsiders or among themselves.

Once the proceedings have commenced, the Presiding Officer should ensure that classified, classifiable or otherwise protected information is not disclosed in open court (Military Commission Order No. 1, paras. 6.B.(3) and 6.D.(5)). The Presiding Officer also shall ensure that classified, classifiable or otherwise protected information that becomes part of the record of trial is properly safeguarded. For instructions regarding protected information, see Section V.

1 **PRESIDING OFFICER (PO):** Please be seated. This Military Commission is called to order.

2 *A folder will be previously placed before each Commission Member location*
3 *and the folder will contain a copy of the appointing order.*

4 **PROSECUTOR (P):** This Military Commission is convened by Appointing Order No. _____
5 dated _____ (as amended by Appointing Order No. _____, dated _____) copies of
6 which have been furnished to the members of the Commission, counsel, and the accused, and
7 which will be marked as a Review Exhibit (RE) 1 and attached to the record.

8 **P:** (The following corrections are noted to the Appointing Order(s): _____.)

9 **P:** The Presidential determination that the accused may be subject to trial by Military
10 Commission has been marked as RE 2. RE 2 is being handed to the Commission SSO for
11 review.

12 [Upon completion of SSO review] RE 2 is being provided to the Presiding Officer and the
13 government requests that this classified exhibit be annexed to the record of trial under seal in
14 accordance with Military Commission Order No. 1.

15 The charges have been properly approved by the Appointing Authority and referred to this
16 Commission for trial. The prosecution caused a copy of the charge(s) in English (and
17 _____, the accused's native language) to be served on the accused on _____. The
18 prosecution is ready to proceed in the Commission trial of *United States v.*
19 _____.

20 The accused, Commission Members and alternate Commission Member(s) named in the
21 Appointing Order(s) and detailed to this Commission are present. All detailed counsel are
22 present (and civilian counsel is also present).

23 A court reporter has been detailed reporter for this Commission and [has been previously sworn]
24 (will be sworn at this time.)) Security personnel have been detailed for this Commission and
25 [(have been previously sworn) (will be sworn at this time.)) (The interpreter(s) (has)(have) been
26 detailed for this Commission and [(has)(have) been previously sworn) (will be sworn at this
27 time.))]

28 *Note: The above reference does not apply to the accused's interpreter, if any.*

29 *Note: The following oath may be used:*

30 **Do you [(solemnly swear) (affirm) to faithfully and properly perform the duties of [**
31 **(Prosecutor) (Defense Counsel) (Civilian Defense Counsel) (Court Reporter) (Security**
32 **Person) (Interpreter) (Foreign Attorney Consultant) (_____) in all Military Commissions**
33 **to which you are appointed or detailed, (so help you God.)**

34 **PO:** I have been designated as the Presiding Officer of this Military Commission by the
35 Appointing Authority and have previously been sworn. The other members of the Commission
36 and alternate members will now be sworn. All persons in the courtroom please rise.

1 **PO:** Commission Members, please raise your right hands. Do you swear or affirm that you will
2 faithfully perform your duties as Military Commission members and alternates, including your
3 duty to proceed impartially and expeditiously and to provide a full and fair trial, and that you will
4 not disclose or discover the vote or opinion of any particular member of the Commission upon
5 findings or sentence unless required to do so in the due course of law, so help you God?

6 **COMMISSION MEMBERS (CM):** (Response).

7 **PO:** Please be seated. The Commission is assembled.

8 *The Presiding Officer shall conduct an inquiry to determine if the accused*
9 *needs the assistance of an interpreter. If defense counsel request an interpreter*
10 *on behalf of the accused, the Presiding Officer shall confirm that request with*
11 *the accused after an interpreter has been provided. If the accused requests an*
12 *interpreter, the Presiding Officer shall determine if the prosecutor has any*
13 *objection to the request and if the prosecutor is prepared to provide an*
14 *interpreter. If the prosecutor objects to providing an interpreter, the Presiding*
15 *Officer shall take the necessary steps to determine if an interpreter is required.*
16 *If Presiding Officer determines that the interpreter provided is deficient in the*
17 *accused's language, he shall take the necessary steps to obtain a qualified*
18 *interpreter. The Presiding Officer shall stay the proceedings until an*
19 *appropriate interpreter is provided. Finally, the interpreter shall be sworn prior*
20 *to beginning service during the proceedings.*

21 **PO:** Before continuing with other preliminary matters, it is necessary for me to inquiry into the
22 accused's need for an interpreter.

23 **PO:** _____, are you able to understand and speak English?

24 **Accused (ACC):**_____.

25 **PO:** (If the accused states he does not speak or understand English or desires an interpreter,
26 continue as follows). What language do you speak?

27 **ACC:** _____.

28 **PO:** Is there an interpreter with you now in the courtroom who speaks the language that you do?
29 If so, please also tell me the interpreter's name.

30 **ACC:** _____.

31 ***NOTE:** If the Accused answers in the negative, the Presiding Officer will cause*
32 *arrangements to be made for the Accused to have a qualified interpreter.*

33 **PO:** In what language will the interpreter be speaking to you?

34 **ACC:** _____.

1 **PO:** (To the interpreter): Please identify yourself, tell me if you are qualified to interpret the
2 Accused's language, and whether you have been sworn.

3 **Interpreter:**_____.

4 ***NOTE:** If the interpreter has not been sworn, the Prosecutor will issue an oath.*

5 **PO:** Prosecutor, please state by whom you have been detailed and your qualifications.

6 **P:** (I) (All members of the prosecution) have been detailed to this Military Commission by the
7 Chief Prosecutor. (I am) (All members of the prosecution are) qualified under Military
8 Commission Order No. 1, Paragraph 4.B and (I) (we) have previously been sworn. (A
9 representative from the Department of Justice, appear(s) as (a) Special Trial Counsel(s)). (I have
10 not) (No member of the prosecution has) acted in any manner, which might tend to disqualify
11 (me) (us) in this proceeding. The detailing document document is now being marked as the next
12 Review Exhibit in order.

13 **P:** [If (an) investigator(s) or similar representative(s) will sit at prosecution table throughout the
14 proceedings] The Prosecution also has sitting at the Prosecution table an (investigator) (assistant)
15 who will assist the Prosecution but will not representing the Government.

16 ***NOTE:** The Prosecutor should identify the investigator by government agency but*
17 *not disclose his identity.*

18 **1-2. ACCUSED'S CHOICE OF COUNSEL**

19 ***In accordance with Military Commission Order No. 1, para. 4.C.(4), an accused***
20 ***"must be represented at all relevant times by Detailed Defense Counsel;" pro se***
21 ***representation is not permitted.***

22 **PO:** _____, pursuant to Military Commission Order Number 1, you can be
23 represented by your detailed defense counsel. (He) (She) (They) (is) (are) provided to you at no
24 expense.

25 You also can request a different military lawyer to represent you. If the person you request is
26 reasonably available, (he)(she) would be appointed to represent you free of charge.

27 In addition, you may be represented by a qualified civilian lawyer. A civilian lawyer would
28 represent you at no expense to the government. (He) (She) must be a U.S. citizen, admitted to
29 the practice of law in a State, district, territory, or possession of the U.S., or a Federal court, may
30 not have been sanctioned or disciplined for any relevant misconduct, be eligible for a Secret
31 clearance, and agree in writing to comply with the orders, rules, and regulations of Military
32 Commissions.

33 If a civilian lawyer represents you, your detailed defense counsel will continue to represent you
34 as well and this detailed defense counsel will be permitted to be present during the presentation
35 of all evidence. Do you understand what I have just told you?

1 **ACC:** (Response).

2 **PO:** Do you have any questions about counsel representation before this Commission?

3 **ACC:** (Response).

4 **PO:** Do you desire to be represented by the counsel currently seated at your table and no other
5 counsel?

6 **ACC:** (Response).

7 **PO:** Defense counsel will announce (his) (her) (their) detailing and qualifications.

8 **DETAILED DEFENSE COUNSEL (DDC):** (I) (All detailed members of the defense) have
9 been detailed to this Military Commission by the Chief Defense Counsel. (I am) (All detailed
10 members of the defense are) qualified under Military Commission Order No. 1, Paragraph 4.C
11 and (I) (we) have previously been sworn. (I have not) (No member of the defense has) acted in
12 any manner that might tend to disqualify (me) (us) in this proceeding. The document detailing
13 counsel is now being marked as a Review Exhibit in order.

14 **CIVILIAN DEFENSE COUNSEL (CDC)** [If present]: I am a civilian counsel who has been
15 determined to be qualified for membership in the pool of qualified civilian defense counsel in
16 accordance with section 4(c)(3) of Military Commission Order Number 1. I have transmitted
17 my notice of appearance through the Chief Defense Counsel. I have signed the civilian counsel
18 Agreement to Practice before a Military Commission and I have not acted in any manner that
19 may tend to disqualify me to practice in this proceeding.

20 **PO** [If civilian defense counsel present]: Please mark the notice of appearance including the
21 qualification determination as RE _____ and attach it to the record.

22 **PO** [If civilian defense counsel present]: The civilian defense counsel will now be sworn. Do
23 you swear or affirm that you will faithfully perform your duties in the Commission now in
24 hearing, so help you God?

25 **CDC** [If present]: I do.

26 **DDC:** (If others are at the defense table who are not detailed or civilian counsel as indicated
27 above (such as a FAC), they will now be identified, and if necessary, sworn.)

28 **PO:** All personnel appear to have the requisite qualifications, and all required to be sworn have
29 been sworn.

30 **1-3. PRESENTATION OF CHARGE(S)**

31 **PO:** Prosecutor, please have the charge sheet marked as RE ____ and attach it to the record. A
32 copy of the charge sheet was distributed to each Commission Member the day prior to start of
33 these proceedings.

1 **P:** (Complies).

2 **PO:** Defense counsel, have you previously been provided a copy of the charge(s)?

3 **DC:** (Response).

4 **PO:** All parties to the trial have been furnished with a copy of the charge(s). The prosecutor will
5 announce the general nature of the charge(s).

6 **P:** The general nature of the charge(s) in this case is (are) _____.

7 **PO:** Members of the Commission and alternate members, at this time it is appropriate for you to
8 review the charge sheet and appointing order(s).

9 *Before continuing, the Presiding Officer should give the Members sufficient*
10 *time to read the charge sheet and appointing order(s).*

11 **PO:** Have all Commission members and alternate members had the opportunity to review the
12 charge sheet and appointing order(s)?

13 **CM:** (Response).

14 **PO:** Is the name and rank of each Commission member and alternate member properly reflected
15 on the appointing order?

16 **CM:** (Response).

17 **PO:** Does either party want the charge(s) to be read in open court?

18 **P:** The prosecutor (does)(does not) want the charge(s) read.

19 **DC:** The accused (does)(does not) want the charge(s) read.

20 **PO:** (The reading will be omitted.) (Prosecutor will read the charge(s).)

21 **1-4. QUESTIONING OF PANEL MEMBERS AND ALTERNATE MEMBERS**

22 **PO:** Members of the Commission and alternates, the Appointing Authority who detailed you to
23 this Commission has the ability to remove you from service on this Commission for good cause.
24 Is any member or alternate aware of any matter that you feel might affect your impartiality or
25 ability to sit as a Commission member? Please bear in mind that any statement you make should
26 be in general terms so as not to disqualify other members.

27 **CM:** (Response).

28 *The Presiding Officer may conduct follow up questioning as appropriate during*
29 *this portion of the proceedings.*

1 **PO:** I have previously filled out a Commission Member Questionnaire. I have previously
2 provided counsel for both sides a summarized biography, and a list of matters that one would
3 ordinarily expect counsel to ask during a voir dire process, and they will now be marked as the
4 RE next in order. Those documents are true. Have all other Commission Members also filled
5 out questionnaires?

6 **CM:** (Response).

7 **PO:** Have both the prosecutor and the defense been provided copies of the Member
8 Questionnaires and had an adequate opportunity to review them?

9 **P/DC:** (Response).

10 **PO:** Prosecutor, please have the member questionnaires marked as the next RE and provide
11 them to me.

12 **P:** (Complies).

13 **PO:** Members, I will now ask you a few preliminary questions. If any member has an
14 affirmative response to any question, please raise your hand. As I ask these questions and make
15 reference to the "members," this refers to both Commission Members and alternates.

16 *In asking the preliminary questions, the Presiding Officer shall ensure that all*
17 *negative and affirmative responses (including those of the Presiding Officer)*
18 *are recorded on the record. The Presiding Officer will have held a conference*
19 *with both counsel prior to the commencement of trial to determine the*
20 *accused's anticipated plea(s) and the existence of any plea agreement.*
21 *Questioning of the members shall be tailored accordingly.*

22 1. Does anyone know the accused? (Negative response) (Affirmative response from
23 _____).

24 2. [If appropriate] Does anyone know any person named in any of the charges?

25 3. Having seen the accused and having read the charge(s), do any of you feel that there is any
26 reason you cannot give the accused a fair trial?

27 4. Do any of you have any prior knowledge of the facts or events in this case that will make you
28 unable to serve impartially?

29 5. Do any of you feel that you cannot vote fairly and impartially because of a difference in rank
30 or because of a command relationship with any other member?

31 6. Have any of you had any dealings with any of the parties to the trial, to include counsel for
32 both sides, which might affect your performance of duty as a Commission member in any way?

33 7. Do any of you feel that you cannot fairly and justly decide this case because of any prior
34 experiences related to previous military assignments or duties?

1 8. Do any of you feel that you cannot fairly and justly decide this case because of something you
2 have read, heard or seen in the media concerning the events of 9-11, al Qaida, Usama Bin Laden,
3 or terrorism generally?

4 9. Have any of you been a victim of an alleged terrorist attack or had a close friend or family
5 member who was a victim of an alleged terrorist attack?

6 10. The following individuals may be called as witnesses before this Military Commission:
7 _____. Do any of you know any of these potential witnesses?

8 11. [If so] Do any of you feel your relationship with any of the potential witnesses will in any
9 way affect your ability to fairly and justly decide this case?

10 12. As Commission Members, we must keep open minds regarding the verdict until all the
11 evidence is in. Is there any member who cannot follow this instruction?

12 13. The accused is presumed innocent and this presumption remains unless his guilt is
13 established beyond a reasonable doubt. The burden to establish the guilt of the accused is on the
14 prosecution. Does each member agree to be guided by this principle in deciding this case?

15 14. [If applicable] Do any of you have any preconceived notions concerning the death penalty
16 that would preclude you from considering this as a punishment?

17 15. Do any of you know of anything of either a personal or professional nature that would cause
18 you to be unable to give your full attention to these proceedings throughout the trial?

19 16. Are any of you aware of any matter that might raise a substantial question concerning your
20 participation in this trial as a Commission member?

21 *Military Commission Instruction No. 8, para. 3.A.(2) states that "the Presiding*
22 *Officer shall determine if it is necessary to conduct or permit questioning of*
23 *members (including the Presiding Officer) on issues of whether there is good*
24 *cause for their removal." If the Presiding Officer permits questioning by the*
25 *Prosecutor or Defense Counsel, it may be done in any manner considered*
26 *appropriate by the Presiding Officer. For example, the Presiding Officer may*
27 *permit counsel to directly question the members, either orally or in writing.*
28 *However, he might instead require that any questions be submitted to him in*
29 *writing for his presentation, if appropriate, to the members. Any questioning,*
30 *however, "shall be narrowly focused on issues pertaining to whether good*
31 *cause may exist for the removal of any member."*

32 *At the close of all questioning, the Presiding Officer should ask counsel if there*
33 *is "good cause" for the removal of any member(s). If the Presiding Officer*
34 *concludes that all Commission members are qualified to serve, he should*
35 *announce:*

1 **PO:** I find that all Commission Members, alternates and I are qualified to serve on this Military
2 Commission. The members of the Commission and alternate members will be those listed on the
3 appointing order.

4 *If the Presiding Officer determines that good cause for removal of any*
5 *member(s) exist(s), then the following rules apply. Under Military Commission*
6 *Instruction No. 8, para. 3.A.(1), the Appointing Authority "may remove*
7 *members or alternate members for good cause." In the event a member (or*
8 *alternate member) is removed for good cause, the Appointing Authority may*
9 *replace the member, direct that an alternate member serve in the place of the*
10 *original member, direct that the proceedings simply continue without the*
11 *member (the alternate member or members continuing to serve only in an*
12 *alternate capacity), or convene a new Commission. In the absence of guidance*
13 *from the Appointing Authority regarding replacement, the Presiding Officer*
14 *shall select an alternate member to replace the member in question.*

15 *While the Presiding Officer lacks the authority to remove a member or alternate*
16 *member for good cause, if he concludes that a member (including the Presiding*
17 *Officer) should be removed for good cause, the Presiding Officer may forward*
18 *information supporting that conclusion, (including any recommendation), to*
19 *the Appointing Authority for action. While awaiting the Appointing Authority's*
20 *decision on the matter, the Presiding Officer may elect either to hold the*
21 *proceedings in abeyance or to continue. The Presiding Officer may issue any*
22 *appropriate instructions to the member whose continued service is in question.*
23 *If proceedings continue, that member shall participate in any vote on*
24 *evidentiary or other administrative or procedural matters. However, a Military*
25 *Commission shall not engage in deliberations on findings or sentence prior to*
26 *the Appointing Authority's decision in any case in which the Presiding Officer*
27 *has recommended a member's removal.*

28 **PO:** Members, at this point in time, it is appropriate for me to inform you of some of the
29 procedures the Commission will be using in deciding this case.

30 During any recess or adjournment, we will not discuss the case with anyone, not even among
31 ourselves. We will hold our discussions of the issues in closed conference when all members are
32 present. When deciding factual issues in this case, we will consider evidence properly admitted
33 before this Commission. In this regard, we will not consider other accounts of the trial or
34 information from other sources as to factual matters involved in this case and we will limit our
35 contact with counsel, the accused and any other potential witnesses.

36 During the course of the military commission proceedings you may not discuss the proceedings
37 with anyone who is not a member of the commission panel. If anyone who is not a member of
38 the commission panel attempts to discuss the proceedings with you, you shall notify me
39 immediately and appropriate action will be taken. While we are in closed session deliberations,
40 we alone will be present. We will remain together and allow no unauthorized intrusion into our
41 deliberations.

1 Each of us has an equal voice and vote in discussing and deciding all issues submitted to us. I
2 will, however, act as Presiding Officer during our closed session deliberations and will speak for
3 the Commission in announcing results. The issues submitted to us will be decided based upon
4 the evidence properly presented before this Commission. Outside influence from superiors,
5 other government officials, the media or any other source will not be tolerated. Members, in the
6 event any such attempt is made to influence you in the performance of your official Commission
7 duties, you shall notify me immediately and appropriate action will be taken. Additionally, it is
8 impermissible for the Appointing Authority, a military commander, or any other government
9 official who may have influence over your career to reprimand or admonish you because of the
10 way you perform your duties as a military commission member. If any such action takes place,
11 you shall notify me immediately.

12 The appearance and demeanor of all parties to the trial should reflect the seriousness with which
13 the trial is viewed. Careful attention to all that occurs during the trial is required of all parties. If
14 anyone needs a break at any time, please let me know.

15 Are there any questions?

16 **CM:** (Response).

17 **1-5. REVIEW OF RESPONSIBILITIES REGARDING PROTECTED INFORMATION**

18 *The Presiding Officer should ensure that classified, classifiable or otherwise*
19 *protected information is not disclosed in open court. Additionally, the Presiding*
20 *Officer shall ensure that classified, classifiable or otherwise protected*
21 *information that becomes part of the record of trial is appropriately*
22 *safeguarded. If there is such potential, implement the procedures contained in*
23 *Section V.*

24 **PO:** Do counsel for both sides understand those provisions of Military Commission Order No. 1
25 governing Protected Information?

26 **P/DC:** (Response).

27 **PO:** Do you understand that you must, as soon as practicable, notify me of any intent to offer
28 evidence involving Protected Information so that I may consider the need to close the
29 proceedings?

30 **P/DC:** (Response).

31 **PO:** Is there any issue relating to the protection of witnesses that should be taken up at this time
32 as may be necessary to discuss and litigate motions or conduct other business before the
33 presentation of evidence on the merits?

34 **P/DC:** (Response).

35 **PO:** As I am required by Military Commission Order No. 1 to consider the safety of witnesses
36 and others at these proceedings, do both counsel understand that they must notify me of any

1 issues regarding the safety of potential witnesses so that I may determine the appropriate ways in
2 which testimony will be received and witnesses protected?

3 **P/DC:** (Response).

4 **1-6. MOTIONS AND PLEA(S)**

5 **PO:** Accused and defense counsel, if you have any motions, please state them now.

6 **DC:** The defense has (no) (the following) motions (requests to defer motions at this time.)

7 ***NOTE:** The Presiding Officer should resolve all motions and other issues capable*
8 *of resolution prior to the entry of plea(s).*

9 **1-7. ENTRY OF PLEA(S)**

10 **PO:** Accused and counsel please rise. _____, how do you plead?

11 **DC:** The accused, _____, pleads as follows: _____.

12 **PO:** You may be seated.

13 ***If the accused pleads guilty to one or more charges, go to Section II.***

14 ***If the accused does not plead guilty to any charge, go to Section III.***

Trial Guide for Military Commissions

(Draft of 22 Aug 2004)

Includes Additional Instructions in the Trial Script highlighted in yellow

**This Guide is a draft and subject to revision, modification, and objection by
Commission participants.**

I. INITIAL SESSION THROUGH ENTRY OF PLEA(S)

1-1. ASSEMBLY OF COMMISSION

PRESIDING OFFICER (PO): Please be seated. This Military Commission is called to order.

A folder will be previously placed before each Commission Member location and the folder will contain a copy of the appointing order and the charges.

PROSECUTOR (P): This Military Commission is convened by Appointing Order No. _____ dated _____ (as amended by Appointing Order No. _____, dated _____) copies of which have been furnished to the members of the Commission, counsel, and the accused, and which will be marked as a Review Exhibit (RE) __ and attached to the record.

P: (The following corrections are noted to the Appointing Order(s): _____.)

P: The Presidential determination that the accused may be subject to trial by Military Commission has been marked as RE __. RE __ is being handed to the Commission SSO for review.

[Upon completion of SSO review] RE __ is being provided to the Presiding Officer and the government requests that this classified exhibit be annexed to the record of trial under seal in accordance with Military Commission Order No. 1.

The charges have been properly approved by the Appointing Authority and referred to this Commission for trial. The prosecution caused a copy of the charge(s) in English (and _____, the accused's native language) to be served on the accused on _____. The prosecution is ready to proceed in the Commission trial of *United States v. _____*.

The accused, Commission Members and alternate Commission Member(s) named in the Appointing Order(s) and detailed to this Commission are present.

~~P: (Reads name of each member and receives response from each member to be noted by reporter.)~~

P: All detailed counsel are present (and civilian counsel is also present).

A court reporter has been detailed reporter for this Commission and [has been previously sworn) (will be sworn at this time.)) Security personnel have been detailed for this Commission and [(have been previously sworn) (will be sworn at this time.)) (The interpreter(s) (has)(have) been detailed for this Commission and [(has)(have) been previously sworn) (will be sworn at this time.))]

RE 11

Note: The above reference does not apply to the accused's interpreter, if any.

Note: The following oath may be used:

Do you [(solemnly swear) (affirm) to faithfully and properly perform the duties of [(Prosecutor) (Defense Counsel) (Civilian Defense Counsel) (Court Reporter) (Security Person) (Interpreter) (Foreign Attorney Consultant) (____)] in all Military Commissions to which you are appointed or detailed, (so help you God.)

PO: I have been designated as the Presiding Officer of this Military Commission by the Appointing Authority and have previously been sworn. The other members of the Commission and alternate members will now be sworn. All persons in the courtroom please rise.

PO: Commission Members, please raise your right hands. Do you swear or affirm that you will faithfully perform your duties as Military Commission members and alternates, including your duty to proceed impartially and expeditiously and to provide a full and fair trial, and that you will not disclose or discover the vote or opinion of any particular member of the Commission upon findings or sentence unless required to do so in the due course of law, so help you God?

COMMISSION MEMBERS (CM): (Response).

PO: Please be seated. The Commission is assembled.

PO: Before continuing with other preliminary matters, it is necessary for me to inquiry into the accused's need for an interpreter.

PO: _____, are you able to understand and speak English?

Accused (ACC): _____.

PO: (If the accused states he does not speak or understand English or desires an interpreter, continue as follows). What language do you speak?

ACC: _____.

PO: Is there an interpreter with you now in the courtroom who speaks the language that you do? If so, please also tell me the interpreter's name.

ACC: _____.

***NOTE:** If the Accused answers in the negative, the Presiding Officer will cause arrangements to be made for the Accused to have a qualified interpreter.*

PO: In what language will the interpreter be speaking to you?

ACC: _____.

PO: (To the interpreter): Please identify yourself, tell me if you are qualified to interpret the Accused's language, and whether you have been sworn.

NOTE: *If the interpreter does not want her/his identify revealed on the record, her/his full name will be written on a piece of paper, which will be marked as an RE, and shown to the interpreter.*

Interpreter: _____.

NOTE: *If the interpreter has not been sworn, the Prosecutor will issue an oath.*

PO: Prosecutor, please state by whom you have been detailed and your qualifications.

P: (I) (All members of the prosecution) have been detailed to this Military Commission by the Chief Prosecutor. (I am) (All members of the prosecution are) qualified under Military Commission Order No. 1, Paragraph 4.B and (I) (we) have previously been sworn. (A representative from the Department of Justice, appear(s) as (a) Special Trial Counsel(s)). (I have not) (No member of the prosecution has) acted in any manner, which might tend to disqualify (me) (us) in this proceeding. The detailing document is now being marked as the next Review Exhibit in order.

P: *[If (an) investigator(s) or similar representative(s) will sit at prosecution table throughout the proceedings]* The Prosecution also has sitting at the Prosecution table an (investigator) (assistant) who will assist the Prosecution but will not representing the Government.

NOTE: *The Prosecutor should identify the investigator by government agency but not disclose his identity.*

1-2. ACCUSED'S CHOICE OF COUNSEL

PO: _____, pursuant to Military Commission Order Number 1, you are represented by your detailed defense counsel. (He) (She) (They) (is) (are) provided to you at no expense.

You also can request a different military lawyer to represent you. If the person you request is reasonably available, (he)(she) would be appointed to represent you free of charge. If you request a different military lawyer and that lawyer is made available to represent you, then your detailed defense counsel would normally be released from your case. You could, however, request that the Appointing Authority or the General Counsel allow your detailed defense counsel to stay on the case.

In addition, you may be represented by a qualified civilian lawyer. A civilian lawyer would represent you at no expense to the government. (He) (She) must be a U.S. citizen, admitted to the practice of law in a State, district, territory, or possession of the U.S., or a Federal court, may not have been sanctioned or disciplined for any relevant misconduct,

be eligible for a Secret clearance, and agree in writing to comply with the orders, rules, and regulations of Military Commissions.

If a civilian lawyer represents you, your detailed defense counsel will continue to represent you as well and this detailed defense counsel will be permitted to be present during the presentation of all evidence. Do you understand what I have just told you?

ACC: (Response).

PO: Do you have any questions about counsel representation before this Commission?

ACC: (Response).

PO: Do you desire to be represented by the counsel currently seated at your table and no other counsel?

ACC: (Response).

PO: Defense counsel will announce (his) (her) (their) detailing and qualifications.

DETAILED DEFENSE COUNSEL (DDC): (I) (All detailed members of the defense) have been detailed to this Military Commission by the Chief Defense Counsel. (I am) (All detailed members of the defense are) qualified under Military Commission Order No. 1, Paragraph 4.C and (I) (we) have previously been sworn. (I have not) (No member of the defense has) acted in any manner that might tend to disqualify (me) (us) in this proceeding. The document detailing counsel is now being marked as a Review Exhibit in order.

CIVILIAN DEFENSE COUNSEL (CDC) [If present]: I am a civilian counsel who has been determined to be qualified for membership in the pool of qualified civilian defense counsel in accordance with section 4(c)(3) of Military Commission Order Number 1. I have transmitted my notice of appearance through the Chief Defense Counsel. I have signed the civilian counsel Agreement to Practice before a Military Commission and I have not acted in any manner that may tend to disqualify me to practice in this proceeding.

PO [If civilian defense counsel present]: Please mark the notice of appearance including the qualification determination as RE _____ and attach it to the record.

PO [If civilian defense counsel present]: The civilian defense counsel will now be sworn. Do you swear or affirm that you will faithfully perform your duties in the Commission now in hearing, so help you God?

CDC [If present]: I do.

DDC: (If others are at the defense table who are not detailed or civilian counsel as indicated above (such as a FAC), they will now be identified, and if necessary, sworn.)

PO: All personnel appear to have the requisite qualifications, and all required to be sworn have been sworn.

1-3. PRESENTATION OF CHARGE(S)

PO: Prosecutor, please have the charge sheet marked as RE ____ and attach it to the record.

P: (Complies).

PO: Defense counsel, have you previously been provided a copy of the charge(s)?

DC: (Response).

PO: All parties to the trial have been furnished with a copy of the charge(s). The prosecutor will announce the general nature of the charge(s).

P: The general nature of the charge(s) in this case is (are) _____.

PO: Members of the Commission and alternate members, at this time it is appropriate for you to review the charge sheet and appointing order(s).

Before continuing, the Presiding Officer should give the Members sufficient time to read the charge sheet and appointing order(s).

PO: Have all Commission members and alternate members had the opportunity to review the charge sheet and appointing order(s)?

CM: (Response).

PO: Is the name, rank, and other identifying data of each Commission member and alternate member properly reflected on the appointing order?

CM: (Response).

PO: Does either party want the charge(s) to be read in open court?

P: The prosecutor (does)(does not) want the charge(s) read.

DC: The accused (does)(does not) want the charge(s) read.

PO: (The reading will be omitted.) (Prosecutor will read the charge(s).)

1-4. QUESTIONING OF PANEL MEMBERS AND ALTERNATE MEMBERS

PO: Members of the Commission and alternates, the Appointing Authority who detailed you to this Commission has the ability to remove you from service on this Commission for good cause. Is any member or alternate aware of any matter that you feel might affect

your impartiality or ability to sit as a Commission member? Please bear in mind that any statement you make should be in general terms so as not to disqualify other members.

CM: (Response).

The Presiding Officer may conduct follow up questioning as appropriate during this portion of the proceedings.

PO: I have previously filled out a Commission Member Questionnaire. I have previously provided counsel for both sides a summarized biography, a list of matters that one would ordinarily expect counsel to ask during a voir dire process, and a document about how I know the Appointing Authority. I also provided all counsel with answers to questions provided by defense counsel in the cases of Al Bahlul, Hamden, and Hicks. These documents will now be marked as the RE next in order. Those documents are true to the best of my knowledge and belief.

PO: Does either party wish to voir dire me outside the presence of the other members?

Note: If either side requests that the members leave, they will retire.

PO: Prosecution, any questions for me?

P:

PO: Defense, any questions for me?

DC:

PO: Any challenge against the Presiding Officer?

P:

DC:

NOTE: If challenged, the Presiding Officer will determine whether the proceedings will continue and present that information to the Appointing Authority to decide whether the challenge shall be granted.

PO: [There are no challenges by either side against the PO for cause.]

PO: [I have considered the challenge for cause made by the Prosecution/Defense. I will forward (a transcript of the voir dire) (the material provided by me to counsel for voir dire) (the transcript of your challenge and opposing counsel's response) (my recommendation on the matter) to the Appointing Authority for his action. You have until _____ to provide me any further matters which you wish me to forward to him along with those which I have indicated. Under the provisions of MCI #8, paragraph 3A(3), I (will) (will not) hold the proceedings in abeyance.]

[If PO remains on the case because not challenged, or because challenged and the proceedings are not being held in abeyance, proceed as follows:]

NOTE: *The other members are recalled.*

PO: Have all Commission Members completed a member questionnaire?

CM: (Response).

PO: Have both the prosecutor and the defense been provided copies of the Member questionnaires and had an opportunity to review them?

P/DC: (Response).

PO: Prosecutor, please have the member questionnaires marked as the next RE and provide them to me. The RE containing the questionnaires will be sealed.

P: (Complies).

PO: Members, I will now ask you a few preliminary questions. If any member has an affirmative response to any question, please raise your hand. As I ask these questions and make reference to the "members," this refers to both Commission Members and alternates.

1. Does anyone know the accused? (Negative response) (Affirmative response from _____).
2. [If appropriate] Does anyone know any person named in any of the charges?
3. Does any member know any of the counsel involved in this case?
4. Having seen the accused and having read the charge(s), do any of you feel that there is any reason you cannot give the accused a fair trial?
5. Do any of you have any prior knowledge of the facts or events in this case that will make you unable to serve impartially?
6. Do any of you feel that you cannot vote fairly and impartially because of a difference in rank or because of a command relationship with any other member?
7. Have any of you had any dealings with any of the parties to the trial, to include counsel for either sides and other members including myself, which might affect your performance of duty as a Commission member in any way?
8. Do any of you feel that you cannot fairly and justly decide this case because of any prior experiences related to previous military assignments or duties?

9. Do any of you feel that you cannot fairly and justly decide this case because of something you have read, heard or seen in the media concerning the events of 9-11, al Qaida, Usama Bin Laden, or terrorism generally?

10. Have any of you been a victim of an alleged terrorist attack or had a close friend or family member who was a victim of an alleged terrorist attack?

11. The following individuals may be called as witnesses before this Military Commission: _____. Do any of you know any of these potential witnesses?

12. [If so] Do you feel your relationship with or prior knowledge of the potential witness will in any way affect your ability to fairly and justly decide this case?

13. As Commission Members, we must keep open minds regarding the verdict until all the evidence is in. The verdict can only be based on evidence received during these proceedings and you may not rely upon any prior knowledge of the facts or events involved, no matter how you received that information. Is there any member who cannot follow this instruction?

14. The accused is presumed innocent and this presumption remains unless and until his guilt is established beyond a reasonable doubt. The burden to establish the guilt of the accused is on the prosecution. Does each member understand and agree with this principle and further agree to follow this principle in deciding this case?

15. Do any of you know of anything of either a personal or professional nature that would cause you to be unable to give your full attention to these proceedings throughout the trial?

16. Are any of you aware of any matter that might raise a substantial question concerning your participation in this trial as a Commission member?

[If there are questions for an individual member, the PO may decide to hold individual voir dire while the non-voir dire members retire.]

PO: I intend to conduct and allow questioning of individual members outside the presence of other members. Does counsel for either side object?

Note: *All members retire.*

PO: Prosecution, any questions for any of the members other than myself?

P:

PO: Defense, any questions for any of the members other than myself?

DC:

: [After all general and individual voir dire is completed.]

PO: Any challenge by either side against any member?

P/DC:

PO: *[If there are no challenges:: I find that all Commission Members, alternates and I are qualified to serve on this Military Commission. The members of the Commission and alternate members will be those listed on the appointing order.]*

[If a member is challenged, the Presiding Officer will determine whether the proceedings will continue and present that information to the Appointing Authority to decide whether the challenge shall be granted.]

[If a member is challenged, and the PO decides that the proceedings will not be held in abeyance, proceed as follows:]

PO: [Counsel, I have considered your challenge to _____. I will forward (a transcript of the voir dire) (the member questionnaire) (the transcript of your challenge and opposing counsel's response) (my recommendation on the matter) to the Appointing Authority for his action. You have until _____ to provide me any further matters which you wish me to forward to him along with those which I have indicated. Under the provisions of MCI #8, paragraph 3A(3), I (will) (will not) hold the proceedings in abeyance.]

PO: Members, at this point, it is appropriate for me to inform you of some of the procedures the Commission will be using in deciding this case.

Each of you has previously received preliminary administrative-type instructions which are now being marked as the next RE in order. To the extent you believe there is any conflict in the instructions given earlier, and the instructions I am about to give, the following instructions shall control.

I have been appointed as the Presiding Officer. On Monday, you were given the President's Military Order, the Military Commission Orders, DoD Directive 5105.70, and all Military Commission Instructions, except instruction number 8. These references apply to all the cases in which you may be a Commission member.

In these references establishing the Commission the Presiding Officer is charged with certain duties. Among these is that I will preside over the Commission proceedings during open and closed sessions. As I am the only lawyer appointed to the Commission, I will instruct and advise you on the law. However, the President has directed that the Commission will decide all questions of law and fact, so you are not bound to accept the law as given to you by me. You are free to accept the law as argued to you by counsel either in court or in motions or attachments thereto. In closed conferences, my voice and my vote will count the same as any other member.

RE 11

During any recess or adjournment, we will not discuss the case with anyone, not even among ourselves. We will hold our discussions of the issues in closed conference when all members are present. When deciding issues in this case, we will consider only evidence properly admitted before this Commission. In this regard, we will not consider other accounts of the trial or information from other sources and we will limit our contact with counsel, the accused and any other potential witnesses.

During the course of the military commission proceedings you may not discuss the proceedings with anyone who is not a member of the commission panel. If anyone who is not a member of the commission panel attempts to discuss the proceedings with you, you shall notify me immediately and appropriate action will be taken. While we are in closed session deliberations, we alone will be present. We will remain together and allow no unauthorized intrusion into our deliberations.

Each of us has an equal voice and vote in discussing and deciding all issues submitted to us. I will, however, act as Presiding Officer during our closed conference deliberations and will speak for the Commission in announcing results. The issues submitted to us will be decided based upon the evidence properly presented before this Commission. Outside influence from superiors, other government officials, the media or any other source will not be tolerated. Members, in the event any such attempt is made to influence you in the performance of your official Commission duties, you shall notify me immediately, and appropriate action will be taken. Additionally, it is impermissible for the Appointing Authority, a military commander, or any other government official who may have influence over your career to reprimand or admonish you because of the way you perform your duties as a military commission member. If any such action takes place, you shall notify me immediately.

Members of the Commission and the alternate member, some of you may serve as a Commission member or alternate on more than one case. You are to remember that each case is separate, and you may not consider evidence or motions practice presentations from one case in any other case unless explicitly advised that you may do so. I tell you this now so that upon any notes you might make that you indicate to which case the notes pertain.

Members of the Commission and the alternate member, you have undoubtedly observed the security arrangements around this building, in the building, and in this courtroom. Those arrangements were made by the local commander based on his view of operational considerations. We are required to follow the security arrangements that have been made because this building is located within the commander's area of operation.

You must not, however, infer or conclude from the security arrangements that the accused is guilty of any offense or that he presents a danger. In other words, operational requirements of the local commander have nothing to do with this accused. The only evidence you may consider on the determination of guilt or innocence, or a sentence if sentencing is required, is the evidence presented to you during Commission sessions. Security arrangements are NOT part of that evidence.

COL [REDACTED] you have been designated an alternate member of this Commission, and will become a member should there become a vacancy on the Commission that needs to be filled. As an alternate member, you will attend all open sessions, however you will not be present for any closed conferences or deliberations, and may not vote on any matter unless your status changes from member to alternate member. Should your status change from alternate member to member, you will be given further instructions.

Members, you are not authorized to reveal your vote, or the factors which led to your vote, or to reveal the vote or comments of another member, when it comes to deliberations on findings and, if necessary, on sentence. This is a lawful order from me to you. You may only reveal such matters if required to do so by superior competent authority in the Military Commission process - namely, the Appointing Authority, the General Counsel of the Department of Defense, the Review Panel for Military Commissions, the Secretary of Defense, or the President of the United States - or by a United States Federal Court. This order is continuing and does not expire.

The appearance and demeanor of all parties to the trial should reflect the seriousness with which the trial is viewed. Careful attention to all that occurs during the trial is required of all parties. If anyone needs a break at any time, please let me know.

Are there any questions?

CM: (Response).

1-5. REVIEW OF RESPONSIBILITIES REGARDING PROTECTED INFORMATION

PO: Do counsel for both sides understand those provisions of Military Commission Order No. 1 governing Protected Information?

P/DC: (Response).

PO: Do you understand that you must, as soon as practicable, notify me of any intent to offer evidence involving Protected Information so that I may consider the need to close the proceedings?

P/DC: (Response).

PO: Is there any issue relating to the protection of witnesses that should be taken up at this time as may be necessary to discuss and litigate motions or conduct other business before the presentation of evidence on the merits?

P/DC: (Response).

PO: As I am required by Military Commission Order No. 1 to consider the safety of witnesses and others at these proceedings, do both counsel understand that they must notify me of any issues regarding the safety of potential witnesses so that I may

determine the appropriate ways in which testimony will be received and witnesses protected?

P/DC: (Response).

1-6. MOTIONS AND PLEA(S)

PO: Accused and defense counsel, if you have any motions, please state them now.

DC: The defense has (no) (the following) motions (requests to defer motions at this time.)

***NOTE:** The Presiding Officer should resolve all motions and other issues capable of resolution prior to the entry of plea(s). However, the entry of pleas will take place at the initial session, even if all motions and other issues are not resolved.*

PO: Counsel, I have considered your request to defer pleas in this case. Your request is (granted) (denied).

1-7. ENTRY OF PLEA(S)

PO: Accused and counsel please rise. _____, how do you plead?

DC: The accused, _____, pleads as follows: _____.

PO: You may be seated.



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DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600



August 11, 2004

MEMORANDUM FOR Presiding Officer, Colonel Peter Brownback

SUBJECT: Presence of Members and Alternate Members at Military Commission Sessions

The Orders and Instructions applicable to trials by Military Commission require the presence of all members and alternate members at all sessions/proceedings of Military Commissions.

The President's Military Order (PMO) of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," requires a full and fair trial, with the military commission sitting as the triers of both fact and law. *See Section 4(c)(2)*. The PMO identifies only one instance in which the Presiding Officer may act on an issue of law or fact on his own. Then, it is only with the members present that he may so act and the members may overrule the Presiding Officer's opinion by a majority of the Commission. *See Section 4(c)(3)*.

Further, Military Commission Order (MCO) No. 1 requires the presence of all members and alternate members at all sessions/proceedings of Military Commissions. Though MCO No. 1 delineates duties for the Presiding Officer in addition to those of other Commission Members, it does not contemplate convening a session of a Military Commission without all of the members present.


The "Commission" is a body, not a proceeding, in and of itself. Each Military Commission, comprised of members, collectively has jurisdiction over violations of the laws of war and all other offenses triable by military commission. The following authority is applicable.

- MCO No. 1, Section 4(A)(1) directs that the Appointing Authority shall appoint the members and the alternate member or members of each Commission. As such, the appointed members and alternate members collectively make up each "Commission."
- MCO No. 1, Section 4(A)(1) also requires that the alternate member or members shall attend all sessions of the Commission. This requirement for alternate



members to attend all sessions assumes that members are required to attend all sessions of the Commission, as well.

- MCO No. 1, Section 4(A)(4) directs the Appointing Authority to designate a Presiding Officer from among the members of each Commission. This is further evidence that the Commission was intended to operate as an entity including all of the members.
- MCO No. 1, Section 4(A)(4) also states that the Presiding Officer will preside over the proceedings of the Commission from which he or she was appointed. Implicit in this statement is the understanding that there are no proceedings without the Commission composed of and operating with all of its members. The Presiding Officer is only one of the appointed members to the Commission, who in addition, presides over the proceedings of the Commission.


Thomas L. Hemminger
Brigadier General, U.S. Air Force
Legal Advisor to the Appointing Authority
for Military Commissions

cc: Chief Defense Counsel
Chief Prosecutor

by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.

(d) If evidence adduced in an investigation under this article indicates that the accused committed an uncharged offense, the investigating officer may investigate the subject matter of that offense without the accused having first been charged with the offense if the accused—

(1) is present at the investigation;

(2) is informed of the nature of each uncharged offense investigated; and

(3) is afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b).

(e) The requirements of this article are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error.

§ 833. Art. 33. Forwarding of charges

When a person is held for trial by general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction. If that is not practicable, he shall report in writing to that officer the reasons for delay.

§ 834. Art. 34. Advice of staff judge advocate and reference for trial

(a) Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate for consideration and advice. The convening authority may not refer a specification under a charge to a general court-martial for trial unless he has been advised in writing by the staff judge advocate that—

(1) the specification alleges an offense under this chapter;

(2) the specification is warranted by the evidence indicated in the report of investigation under section 832 of this title (article 32) (if there is such a report); and

(3) a court-martial would have jurisdiction over the accused and the offense.

(b) The advice of the staff judge advocate under subsection (a) with respect to a specification under a charge shall include a written and signed statement by the staff judge advocate

(1) expressing his conclusions with respect to each matter set forth in subsection (a); and

(2) recommending action that the convening authority take regarding the specification.

If the specification is referred for trial, the recommendation of the staff judge advocate shall accompany the specification.

(c) If the charges or specifications are not formally correct or do not conform to the substance of the evidence contained in the report of the investigating officer, formal corrections, and such changes in the charges and specifications as are needed to make them conform to the evidence, may be made.

§ 835. Art. 35. Service of charges

The trial counsel to whom court-martial charges are referred for trial shall cause to be served upon the accused a copy of the charges upon which trial is to be had. In time of peace no person may, against his objection, be brought to trial or be required to participate by himself or counsel in a session called by the military judge under section 839(a) of this title (article 39(a)), in a general court-martial case within a period of five days after the service of charges upon him or in a special court-martial within a period of three days after the service of the charges upon him.

SUBCHAPTER VII. TRIAL PROCEDURE

Sec. Art.

836.	36. President may prescribe rules.
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§ 836. Art. 36. President may prescribe rules

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

§ 837. Art. 37. Unlawfully influencing action of court

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or

sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

(b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

§ 838. Art. 38. Duties of trial counsel and defense counsel

(a) The trial counsel of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of the proceedings.

(b)(1) The accused has the right to be represented in his defense before a general or special court-martial or at an investigation under section 832 of this title (article 32) as provided in this subsection.

(2) The accused may be represented by civilian counsel if provided by him.

(3) The accused may be represented—

(A) by military counsel detailed under section 827 of this title (article 27); or

(B) by military counsel of his own selection if that counsel is reasonably available (as determined under regulations prescribed under paragraph (7)).

(4) If the accused is represented by civilian counsel, military counsel detailed or selected under paragraph (3) shall act as associate counsel unless excused at the request of the accused.

(5) Except as provided under paragraph (6), if the accused is represented by military counsel of his own selection under paragraph (3)(B), any military counsel detailed under paragraph (3)(A) shall be excused.

(6) The accused is not entitled to be represented by more than one military counsel. However, the person authorized under regulations prescribed under section 827 of this title (article 27) to detail counsel in his sole discretion—

(A) may detail additional military counsel as assistant defense counsel; and

(B) if the accused is represented by military counsel of his own selection under paragraph (3)(B), may approve a request from the accused that military counsel detailed under paragraph (3)(A) act as associate defense counsel.

(7) The Secretary concerned shall, by regulation, define

“reasonably available” for the purpose of paragraph (3)(B) and establish procedures for determining whether the military counsel selected by an accused under that paragraph is reasonably available. Such regulations may not prescribe any limitation based on the reasonable availability of counsel solely on the grounds that the counsel selected by the accused is from an armed force other than the armed force of which the accused is a member. To the maximum extent practicable, such regulations shall establish uniform policies among the armed forces while recognizing the differences in the circumstances and needs of the various armed forces. The Secretary concerned shall submit copies of regulations prescribed under this paragraph to the Committees on Armed Services of the Senate and House of Representatives.

(c) In any court-martial proceeding resulting in a conviction, the defense counsel—

(1) may forward for attachment to the record of proceedings a brief of such matters as he determines should be considered in behalf of the accused on review (including any objection to the contents of the record which he considers appropriate);

(2) may assist the accused in the submission of any matter under section 860 of this title (article 60); and

(3) may take other action authorized by this chapter.

(d) An assistant trial counsel of a general court-martial may, under the direction of the trial counsel or when he is qualified to be a trial counsel as required by section 827 of this title (article 27), perform any duty imposed by law, regulation, or the custom of the service upon the trial counsel of the court. An assistant trial counsel of a special court-martial may perform any duty of the trial counsel.

(e) An assistant defense counsel of a general or special court-martial may, under the direction of the defense counsel or when he is qualified to be the defense counsel as required by section 827 of this title (article 27), perform any duty imposed by law, regulation, or the custom of the service upon counsel for the accused.

§ 839. Art. 39. Sessions

(a) At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to section 835 of this title (article 35), call the court into session without the presence of the members for the purpose of—

(1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

(2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court;

(3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving the pleas of the accused; and

(4) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 836 of this title (article 36) and which does not require the presence of the members of the court. These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be

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57 M.J. 35, *; 2002 CAAF LEXIS 678, **

UNITED STATES, Appellee v. John S. STONEMAN, Specialist, U.S. Army, Appellant

No. 01-0295

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

57 M.J. 35; 2002 CAAF LEXIS 678

January 22, 2002, Argued
July 5, 2002, Decided

PRIOR HISTORY: [**1] Crim. App. No. 9800137. Military Judges: Stephen V. Saynisch and Debra L. Boudreau. United States v. Stoneman, 56 M.J. 253; 2001 CAAF LEXIS 1527.

DISPOSITION: Decision of the United States Army Court of Criminal Appeals set aside; remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant soldier was convicted by a general court-martial of officer and enlisted members, contrary to his pleas, of raping and sodomizing a child under the age of sixteen, in violation of Unif. Code Mil. Justice arts. 120 and 125, 10 U.S.C.S. §§ 920 and 925. The Court of Criminal Appeals affirmed the findings and sentence, and appellant sought review on the issue of undue command influence.

OVERVIEW: The soldier was court-martialed soon after the brigade commander issued several edicts demanding that his troops must improve their conduct, including no more "raping" of female soldiers, and that those who did not would be "crushed." Before trial, defense counsel raised the issue and presented some evidence of potential bias as a result of unlawful command influence. The defense asserted that members of the brigade should be removed from the court-martial panel for implied bias. After questioning a couple of members, the military judge denied the motion for a stay and the defense challenges for cause based on implied bias, and four members of the brigade remained on the panel. On appeal, the soldier argued that the military judge erred by failing to stay the proceedings, by misapplying the test for implied bias based on unlawful command influence, by failing to hold a hearing on the issue of unlawful command influence, and by failing to shift the burden of proof to the Government. A split appellate court agreed that the trial judge's questioning was insufficient to ensure that the case was not tainted by unlawful command influence, and remanded for a full factfinding hearing.

OUTCOME: The case was remanded to the trial court for a hearing on appellant's claim of unlawful command influence to determine if the court-martial was tainted. The convening authority may set aside the findings and sentence and order a rehearing or dismiss the charges.

CORE TERMS: command influence, e-mail, military, leader, brigade, court-martial, soldier, message, voir dire, commander, training, briefing, duty, bias, sentence, leadership, hip, appearance, responded, trouble, conclusions of law, evidence presented, unfairness, demeanor, sergeant, enlisted, defense counsel, battalion, crush, recollection

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HN1 ⚡ The United States Court of Appeals for the Armed Forces reviews de novo the question whether the facts in a court-martial constitute unlawful command influence. Once the issue has been raised, the Government must persuade the court beyond a reasonable doubt either that there was no unlawful command influence or that the proceedings were untainted. [More Like This Headnote](#)

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HN2 ⚡ The burden is on defense counsel, trial counsel, and a military judge to fully question the court members during voir dire to determine whether a commander's comments had an adverse impact on the member's ability to render an impartial judgment. However, in some cases, voir dire may not be enough, and witnesses may be required to testify on the issue of unlawful command influence. [More Like This Headnote](#)

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HN3 ⚡ The analytical framework for resolving court-martial claims of unlawful command influence is: At trial, the initial burden is on the defense to raise the issue. The burden of proof is low, but more than mere allegation or speculation. The quantum of evidence required to raise unlawful command influence is some evidence. The defense must show facts that, if true, constitute unlawful command influence, and it must show that the unlawful command influence has a logical connection to the court-martial in terms of potential to cause unfairness in the proceedings. If the defense shows such facts by some evidence, the issue is raised. Once the issue of command influence is raised, the burden shifts to the Government. The Government may show either that there was no unlawful command influence or that any unlawful command influence did not taint the proceedings. If the Government elects to show that there was no unlawful command influence, it may do so either by disproving the predicate facts on which the allegation of unlawful command influence is based, or by persuading the military judge that the facts do not constitute unlawful command influence. The Government also may choose to not disprove the existence of unlawful command influence but to prove that it will not affect the proceedings. The quantum of evidence required is proof beyond a reasonable doubt. [More Like This Headnote](#)

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HN4 ⚡ R.C.M. 912(f)(3), Manual for Courts-Martial, United States (2000), places the burden of establishing the grounds for challenge on the challenging party. However, R.C.M. 912(f)(3) does not define the quantum of proof required to establish a ground for challenge. [More Like This Headnote](#)

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HN5 ⚡ The quantum of proof required under R.C.M. 912(f)(3), Manual for Courts-Martial, United States (2000) is higher than the "some evidence" required to raise an issue of unlawful command influence. Thus, a military judge's determination that the defense has not sustained the greater burden of establishing a challenge under R.C.M. 912(f)(3) does not answer the question whether the defense has met the lesser burden of presenting some evidence of unlawful command influence, thereby shifting the burden to the Government. [More Like This Headnote](#)

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HN6 ⚡ Unlawful command influence in a court-martial involves questions of fact as well as questions of law. Once the issue is raised, a military judge must determine the

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facts and then decide whether those facts constitute unlawful command influence. [More Like This Headnote](#)

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HN7 In a court-martial, the question whether there is an appearance of unlawful command influence is judged objectively, through the eyes of the community. [More Like This Headnote](#)

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HN8 While demeanor is a measure of actual bias, it is also relevant to an objective observer's consideration. On an issue as sensitive as unlawful command influence, evaluation of demeanor of the court members as well as other witnesses, viewed through the presumption of prejudice, is critical to evaluate whether there is an objective appearance of unfairness. Even if there was no actual unlawful command influence, there may be a question whether the influence of command placed an intolerable strain on public perception of the military justice system. [More Like This Headnote](#)

COUNSEL: For Appellant: Captain Sean S. Park (argued); Colonel Adele H. Odegard, Lieutenant Colonel E. Allen Chandler, Jr., and Major Imogene M. Jamison (on brief); Lieutenant Colonel David A. Mayfield.

For Appellee: Captain Paul T. Cygnarowicz (argued); Colonel Steven T. Salata, Lieutenant Colonel Paul H. Turney, and Major Anthony P. Nicastro (on brief).

JUDGES: GIERKE, J., delivered the opinion of the Court, in which EFRON and BAKER, JJ., and SULLIVAN, S.J., joined. SULLIVAN, S.J., filed a concurring opinion. CRAWFORD, C.J., filed a dissenting opinion.

OPINIONBY: GIERKE

OPINION: [*36] Judge GIERKE delivered the opinion of the Court.

A general court-martial composed of officer and enlisted members convicted appellant, contrary to his pleas, of raping and sodomizing a child under the age of sixteen, in violation of Articles 120 and 125, Uniform Code of Military Justice (UCMJ), 10 USC §§ 920 and 925, respectively. The adjudged and approved sentence provides for a bad-conduct discharge, confinement for seventy-eight months, [*2] total forfeitures, and reduction to the lowest enlisted grade. The Court of Criminal Appeals affirmed the findings and sentence. 54 M.J. 664 (2000).

This Court granted review of the following issues:

I. WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY DENYING THE DEFENSE'S MOTION TO STAY THE PROCEEDINGS UNTIL THE PANEL WAS PROPERLY SELECTED SO AS NOT TO INCLUDE THE MEMBERS OF THE FIRST BRIGADE WHO RECEIVED AN E-MAIL FROM THE BRIGADE COMMANDER, AND/OR ATTENDED THE RELATED BRIEFING IN WHICH THE COMMANDER STATED HIS INTENT TO "CRUSH" THOSE WHO DID NOT LIVE UP TO A CERTAIN STANDARD.

II. WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY FAILING TO SHIFT THE BURDEN TO THE GOVERNMENT ONCE THE DEFENSE ESTABLISHED A CASE OF UNLAWFUL COMMAND INFLUENCE BY MAKING A WRITTEN MOTION, APPENDING AN INCRIMINATING E-MAIL MESSAGE

Review Exhibits 1-15

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TO THE MOTION, AND PROFERRING TESTIMONY OF A WITNESS TO A BRIEFING AT WHICH THE BRIGADE COMMANDER MADE INAPPROPRIATE COMMENTS ABOUT DISCIPLINE IN THE PRESENCE OF SEVERAL COURT MEMBERS.

III. WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED IN ATTEMPTING TO "RECREATE" THE UNLAWFUL COMMAND INFLUENCE **[**3]** HEARING THAT THE MILITARY JUDGE SHOULD HAVE CONDUCTED.

IV. WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT THE MILITARY JUDGE DID NOT ABUSE HER DISCRETION BY DENYING THE DEFENSE'S CHALLENGE FOR CAUSE AGAINST PANEL MEMBERS WHO RECEIVED AN E-MAIL MESSAGE FROM THEIR BRIGADE COMMANDER THAT CONTAINED STATEMENTS REGARDING HIS INTENT TO "CRUSH" THOSE WHO DID NOT LIVE UP TO A CERTAIN STANDARD.

For the reasons set out below, we remand for further proceedings.

Background

Appellant was a member of Headquarters and Headquarters Company, 1st Battalion, 17th Infantry, a subordinate unit of the 1st Brigade, 6th Infantry Division (Light). On December 21, 1997, Colonel (COL) Brook, the brigade commander, sent an e-mail to the brigade leadership and supporting unit commanders, notifying them of mandatory leaders' training on December 23, 1997. The e-mail informed all battalion and company commanders that he expected them "to ensure the following happens after [his] leader training":

(1) "Declare war on all leaders not leading by example, both on and off duty," and inform them that failure to lead by example "will result in relief, negative [evaluation reports]; **[**4]** or UCMJ action."

[*37] (2) Develop a unit plan for "ZERO DUIs [driving under the influence] during the holiday period";

(3) "Ensure EVERY single soldier, or geographical batchelor [sic], in the Brigade is invited over to someone's home, or the unit is having a special barracks function" on Christmas Day;

(4) "Ensure all new soldiers . . . are integrated into the unit, and NOT being treated as the 'FNG' [f new guy] prior to Christmas. If you don't have a good integration plan for the new soldiers, you will have a rash of problems, DUIs, etc. over the holiday period. Be proactive, and ensure this doesn't happen."

COL Brook then articulated his leadership philosophy, including the following comments:

I am sick of leaders who are leaders by virtue of their rank only. My New Years Resolution is to CRUSH all leaders in this Brigade who don't lead by example, on and off duty. Leaders must focus on developing their REFERENT power, the power given to them by subordinates who respect them because of caring competent leadership, rather than their LEGAL power, which is the power they have by virtue of their rank.

* * *

I'm sick of leaders getting DUIs, abusing **[**5]** their position, being lazy, not

achieving [Brigade physical training] standards, taking the easy way out regarding safety, and never going the extra mile. I'm sick of encountering leaders who could care less about soldiers, and are SELF CENTERED pukes. I am sick of hearing about leaders who are morally and spiritually bankrupt. I am declaring war on leaders like this, because they don't deserve to be leaders of America's sons and daughters, and they are not doing what the American taxpayer expects them to do.

* * *

. . . If leaders don't lead by example, and practice self-discipline, then the very soul of our Army is at risk. No more [platoon sergeants] getting DUIs, no more NCOs [noncommissioned officers] raping female soldiers, no more E7s coming up "hot" for coke, no more stolen equipment, no more "lost" equipment, no more approved personnel actions for leaders with less than 260 APFT [Army physical fitness test scores], no more leader APFT failures at [Department of the Army] schools, all of this is BULLSHIT, and I'm going to CRUSH leaders who fail to lead by example, both on and off duty.

54 M.J. at 676.

On January 9, 1998, COL Brook **[**6]** sent a second e-mail, stating that nothing in his previous e-mail was intended to suggest specific actions for leadership failures. He informed his commanders that appropriate action for particular cases was defined as "what each individual commander . . . deemed so in the exercise of independent discretion." COL Brook further stated:

. . . Nothing in what I have said in this or the earlier e-mail, or what I said at the Leader Training, has anything to do with what any soldier does as a member of a court-martial panel or as a witness before a court-martial. The sworn duty of any court-martial panel member is to follow the instructions of the military judge, apply law to admissible facts, and decide a sentence based solely on the evidence presented in court. Nothing said outside a court-martial by anybody, TO INCLUDE ME, may have any bearing on the outcome of any given case or sentence.

Id. at 678.

On January 22, 1998, defense counsel submitted a motion to the military judge asking her to stay the proceedings until all members of the 1st Brigade were removed from the panel. The defense asserted that several NCOs perceived COL Brook's message to be "that **[**7]** leaders who found themselves in trouble needed to be 'crushed.'" The defense proffered the testimony of Staff Sergeant (SSG) Mallerard that no one present at the leaders' training "had any doubt what COL Brook meant to get across -- that is, crush these soldiers that get into trouble." The defense asserted that the members of the **[*38]** brigade should be removed from the court-martial panel for implied bias. The defense conceded that the unlawful command influence only affected court members from the 1st Brigade, and not potential witnesses.

When appellant's court-martial convened on January 25, 1998, the military judge ruled that the request for a stay was premature, because any issues involving unlawful command influence could be addressed during individual voir dire. During group voir dire, five of the

nine members of the panel acknowledged seeing an e-mail regarding disciplinary problems within the brigade. The members were then questioned individually.

Lieutenant Colonel (LTC) Saul was COL Brook's second in command and had assumed command of the brigade on three occasions in COL Brook's absence. He recalled that COL Brook's first e-mail suggested "the appearance of a lack of **[**8]** law and order among certain elements of the brigade." He thought that the message was directed at all enlisted members of the brigade. He described the leaders' training session on December 23 as follows:

[A] discussion, a monologue from the brigade commander, in regards that a series of criminal acts or violations of the law, to include a number of driving under the influence or drunk driving cases; there was reference to a rape of a female enlisted soldier by a noncommissioned officer; some details were discussed in that case; and a general perception on the part of the brigade commander was that there was an element within the brigade that violation of the law was common.

The only guidance that LTC Saul recalled was "a tightening up of the chain of command and enforcement of discipline and standards." LTC Saul had no recollection of the second e-mail message.

LTC Saul told the military judge that he did not think that COL Brook's actions had any impact on him as a court member. He did not perceive COL Brook's actions as an "exhortation to . . . be tough in this case."

LTC Withers, the brigade executive officer, perceived the first e-mail as "aimed at the leaders, **[**9]** " addressing "the problems we had had with discipline," and "urging leaders not to accept substandard performance, especially by leaders." He recalled that the e-mail "made a statement that leaders should scrunch or squash, or something, NCOs especially and other officers, who committed crimes, had a DUI, something like that."

LTC Withers recalled that the December 23 leaders' training had "certainly the same tone, the same subject matter." He explained:

The brigade had had several DUIs, there was a rash of DUIs; it was an attention getter, trying to get people to wake up and realize the seriousness of DUIs and so he was talking that leaders should exhibit a higher standard, and any leader who did something like that it was questionable if they should be around.

LTC Withers perceived the second e-mail as an attempt to clarify the first, and to make it clear that the first e-mail "was not in any way, shape or form, intended to make us -- or to inhibit his subordinates in the proper handling of UCMJ and other legal matters." When asked if COL Brook's actions would affect his performance as a court member, he responded, "Not at all." He explained:

Colonel Brook is **[**10]** a very impassioned man; he holds his values very high; he shoots from the hip; he knows he shoots from the hip. I had talked to him about that and a wide variety of subjects. I've been in the Army long enough to have seen statements like that before; and quite frankly I've been in the Army so long that I'm not really concerned at this point what my rater thinks; I'm going to

do what I think is right, because that's what I've done all my career.

LTC Moody commanded an aviation battalion that supported the 1st Brigade but was not part of it. He stated that he probably read the e-mail messages because he receives a courtesy copy of brigade correspondence. He recalled that the message "may have had something to do with accountability, integrity." He stated that he respects COL Brook, "but he's not my brigade commander." LTC Moody was invited to the leadership training but did not attend.

[*39] Command Sergeant Major (CSM) Pagan was the brigade command sergeant major. Although he worked directly for COL Brook, he did not participate in the drafting of the e-mail messages. His perception of the first e-mail was as follows:

Just trying to convey to everybody how serious these situations **[**11]** are, and that we should do everything in our power as leaders to make sure that we're talking to our soldiers about all the pitfalls that are out there awaiting you, and keep these things in mind and convey that to the soldiers so that they're thinking about that, those situations; the situation that could happen to them, or either -- DUIs, or putting themselves in a compromising situation, so forth and so on. And trying to prevent people from getting into trouble.

Asked whether he thought the e-mail told him what he should do when "confronted with someone who is in trouble," he responded, "No, not at all." CSM Pagan had no recollection of the second e-mail.

CSM Pagan was asked to comment on the first e-mail, and he responded:

He was thinking about a few leaders out there at different levels, and that he probably overreacted and put it on e-mail. He shot from the hip, versus talking to somebody else and maybe let them, kind of, see what he was writing and maybe say "Hey sir, you need to calm that down a little bit."

CSM Pagan believed that COL Brook sent the same message at the December 23 leaders' training. He believed that the briefing "covered all soldiers from **[**12]** Private to Colonel." However, he thought that the tone of the briefing "was completely different." At the briefing, "it was an upbeat tone by [Col Brook], and it was more on the verge of 'Let me tell you how I can keep you and your soldiers out of trouble.'"

When the military judge asked CSM Pagan whether one of the civilian spectators in the courtroom could be assured that he would be a fair and impartial court member, he responded:

Well, I've been a fair and impartial member of the United States Army, as well as my nation, serving for close to 25 years; and I'm not one to be swayed, I'm not one to comply with something just because somebody else said it. I'll stick by my guns and come to the conclusion that I feel is appropriate; no matter who's in that group, or in this members [sic] of the jury; I will take all the information that's given to me, make a rational decision, evaluate all that information, and I will make the best decision that I see possible with that information, and listening to others that have an opinion on that subject.

Master Sergeant (MSG) Peele was the brigade chemical NCO. He stated that he read some of the first e-mail, and "what [he] **[**13]** got out of it was about the incidents about the drunk driving and things like that." He did not think that the e-mail conveyed any message to him that he "didn't already have in [his] mind about drunk driving." He did not think that it gave him any guidance about being a leader. He disagreed with the focus of the leaders' training. Regarding his duties as a court member, he told the military judge, "I don't need a Colonel to tell me now to do my duties, ma'am, I can do them on my own; and I think that he could take a message from me" regarding the treatment of soldiers in the brigade. MSG Peele thought that racism and the standards of treatment of soldiers in the brigade were more appropriate issues than focusing on DUI. Asked by defense counsel what effect the message had on him, MSG Peele responded:

Well, if you're doing your job, sir, everyday like you should be doing, as I do, I feel it had no affect [sic] on me. It does affect me to the point of you can't tell me to lead by example if you don't do it; and that's just my opinion, sir.

MSG Peele did not see the second e-mail.

Sergeant First Class (SFC) Robbins, a member of appellant's battalion, did not see **[**14]** either e-mail, but he did attend the leaders' training on December 23. He told the military judge that he did not think the December 23 briefing had any bearing on his court-martial duties.

[*40] The military judge denied the motion for a stay and the defense challenges for cause based on implied bias. She explained:

I've read *United States versus Youngblood*, [47 M.J. 338 (1997)], and I certainly agree with the court in that case that implied bias is critical and it's reviewed through the eyes of the public; but if it was reviewed through the eyes of the public the responses that the court members gave, if members of the public were sitting in the back of the courtroom and heard their responses given on voir dire by the members of 1st Brigade who have been selected to serve in this court-martial, I think they would see that these members represent the finest traditions of the United States Army as court members, and would certainly not be swayed by anything Colonel Brook might say; they viewed his comments as being intemperate, and I think that everyone heard them say loudly and clearly that they will discharge their responsibilities as court members and vote **[**15]** in accordance with their conscience.

Defense counsel later challenged LTC Saul for cause on several grounds, including his answers on voir dire about COL Brook's message. The military judge granted the challenge, explaining:

In the interest of granting challenges for cause liberally, based upon my observations as well of Lieutenant Colonel Saul, he was the only one that didn't take great pains to distance himself from Colonel Brook's comments; he was the only one who believed that, I think, the message extended to all soldiers, including those at the Private level.

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A defense challenge for cause against CSM Pagan was granted on multiple grounds, including a recent conflict with defense counsel. After challenges, four members of the 1st Brigade remained on the panel: LTC Withers, LTC Moody, MSG Peele, and SFC Robbins.

The Court of Criminal Appeals held that the military judge did not err by declining to rule on the motion for a stay until after voir dire. 54 M.J. at 671. It held that she did not abuse her discretion by denying the implied bias challenges. *Id.* at 673. It noted that she "never articulated whether, under command influence [**16] law, the appellant had met his initial burden to show facts constituting unlawful command influence that were logically connected to the court-martial, and which had the potential to cause unfairness in the proceedings, thereby shifting the burden of proof to the government." *Id.*; see *United States v. Biagase*, 50 M.J. 143, 150 (1999). Instead, the military judge based her ruling "purely on the law of causal challenges." *Id.* The court below held that any error based on failure to apply the burden-shifting mandated by *Biagase* was harmless. *Id.*

The court below also noted that the military judge "did not make any specific findings of fact as to the content of the leaders' training or conclusions of law as to whether COL Brook's comments constituted unlawful command influence." It found this omission harmless. 54 M.J. at 674.

The court below then conducted a de novo review of the record to determine whether the trial was tainted by unlawful command influence. Based on the members' responses during voir dire, the court concluded that COL Brook "did not attempt to coerce or, by any unauthorized means, influence the action" of the court-martial. [**17] *Id.*, quoting Art. 37, UCMJ, 10 USC § 837. The court agreed that COL Brook was "shooting from the hip," that his language was intemperate, and that his comments "may have been inappropriate," but it held that his comments were not unlawful. *Id.* The court below concluded "beyond a reasonable doubt that the findings and sentence in the appellant's case were not affected by COL Brook's e-mails and leaders' training." *Id.*

Discussion

Appellant asserts that the military judge erred by failing to stay the proceedings, by misapplying the test for implied bias based on unlawful command influence, by failing to hold a hearing on the issue of unlawful command influence, and by failing to shift the burden of proof to the Government as required by *Biagase*, supra. Appellant also [**41] asserts that the court below erred when it "recreated" the hearing that the military judge should have conducted. The Government asserts that the military judge correctly denied the challenges founded on implied bias, and that the court below correctly determined, after a de novo review of the record, that appellant failed to establish unlawful command influence.

Unlawful [**18] command influence is "the mortal enemy of military justice." *United States v. Thomas*, 22 M.J. 388, 393 (CMA 1986). On appeal, ^{HN1} this Court reviews de novo the question whether the facts constitute unlawful command influence. *United States v. Johnson*, 54 M.J. 32, 34 (2000). Once the issue has been raised, the Government must persuade this Court beyond a reasonable doubt either that there was no unlawful command influence or that the proceedings were untainted. *Biagase*, supra; *Thomas*, supra.

In *Thomas*, supra at 396, this Court placed ^{HN2} the burden on defense counsel, trial counsel, and the military judge to "fully question the court members during voir dire" to determine whether a commander's comments "had an adverse impact on the member's ability to render an impartial judgment." This Court recognized, however, that in some cases, voir dire may not be enough, and that witnesses may be required to testify on the issue of unlawful

In Youngblood, *supra*, relied on by the military judge in this case, this Court held that the military judge erred by denying challenges for cause **[**19]** based on unlawful command influence. Youngblood was decided as an implied bias case, not an unlawful command influence case. Because this Court did not reach the question whether unlawful command influence was raised, it did not apply the burden-shifting analysis set out in its later Biagase decision. 47 M.J. at 339.

In Biagase, this Court set out ^{HN3} the analytical framework for resolving claims of unlawful command influence. At trial, the initial burden is on the defense to "raise" the issue. The burden of proof is low, but more than mere allegation or speculation. The quantum of evidence required to raise unlawful command influence is "some evidence." 50 M.J. at 150.

The defense must show facts that, if true, constitute unlawful command influence, and it must show that the unlawful command influence has a logical connection to the court-martial in terms of potential to cause unfairness in the proceedings. If the defense shows such facts by "some evidence," the issue is raised. *Id.*

Once the issue is raised, the burden shifts to the Government. *Id.* The Government may show either that there was no unlawful command influence or that any unlawful **[**20]** command influence did not taint the proceedings. If the Government elects to show that there was no unlawful command influence, it may do so either by disproving the predicate facts on which the allegation of unlawful command influence is based, or by persuading the military judge that the facts do not constitute unlawful command influence. The Government also may choose to not disprove the existence of unlawful command influence but to prove that it will not affect the proceedings. Whichever tactic the Government chooses, the quantum of evidence required is proof beyond a reasonable doubt. *Id.* at 151.

Unlike the law pertaining to unlawful command influence, there is no burden shifting in the law pertaining to challenges. ^{HN4} RCM 912(f)(3), Manual for Courts-Martial, United States (2000 ed.), n1 places the burden of establishing the grounds for challenge on the challenging party. However, RCM 912(f)(3) does not define the quantum of proof required to establish a ground for challenge. This Court has not addressed the quantum of proof required under Rule 912(f)(3), and we need not precisely define it in this case. We are satisfied, however, that ^{HN5} the quantum of proof required **[**21]** under RCM 912(f)(3) is higher than the "some evidence" required to raise an issue of unlawful command influence. Thus, a military judge's determination that the defense has not sustained **[*42]** the greater burden of establishing a challenge under RCM 912(f)(3) does not answer the question whether the defense has met the lesser burden of presenting "some evidence" of unlawful command influence, thereby shifting the burden to the Government.

- - - - - Footnotes - - - - -

n1 This Manual provision is identical to the one in effect at the time of appellant's court-martial.

- - - - - End Footnotes - - - - -

As noted by the court below, the military judge did not make findings of fact and conclusions of law, nor did she analyze the evidence in accordance with the Biagase framework. n2 54 M.J. at 673-74. Thus, the question before us is whether the lower court's de novo review of the record and its analysis under the Biagase framework are an adequate substitute for a hearing at the trial level and are sufficient to ensure that this case was not tainted by

unlawful **[**22]** command influence. We hold that further proceedings are necessary to determine if the court-martial was tainted.

----- Footnotes -----

n2 The dissent notes that Biagase was decided after appellant's trial. However, the Biagase decision, which then-Judge Crawford joined, did not establish a new requirement for making findings of fact and conclusions of law or otherwise announce new law; it merely synthesized this Court's jurisprudence and established an analytical framework for resolving issues of unlawful command influence. Long before Biagase, this Court recognized that ^{HN6} unlawful command influence involves questions of fact as well as questions of law. Once the issue is raised, a military judge must determine the facts and then decide whether those facts constitute unlawful command influence. See United States v. Gerlich, 45 M.J. 309, 310-11 (1996); United States v. Ayala, 43 M.J. 296, 299 (1995); United States v. Stombaugh, 40 M.J. 208, 213-14 (CMA 1994). The "some evidence" standard was set out in Ayala, supra at 300. The burden-shifting was set out in Gerlich, supra at 310. The requirement to prove beyond a reasonable doubt that the proceedings were unaffected by unlawful command influence was announced in United States v. Thomas, 22 M.J. 388, 394 (CMA 1986).

----- End Footnotes----- **[**23]**

In United States v. Ginn, 47 M.J. 236, 242 (1997), this Court concluded that Congress intended the Courts of Criminal Appeals "to act as factfinder in an appellate-review capacity and not in the first instance as a trial court." In this case, there was no factfinding hearing, and no analysis under the Biagase framework at the trial level. As a result, there are no trial-level findings of fact regarding the content, tone, and impact of COL Brook's leadership training session on December 23. We cannot determine if additional witnesses would shed light on the issue. In this regard, we note that the defense proffered the testimony of SSG Mallerard, the brigade training NCO, but the military judge did not act on that proffer.

Finally, the record of trial does not provide an appellate court the opportunity to observe the demeanor of the court members. This Court has long recognized that, once unlawful command influence is raised, "we believe it incumbent on the military judge to act in the spirit of the Code by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings. **[**24]**" United States v. Rosser, 6 M.J. 267, 271 (CMA 1979). Accordingly, disposition of an issue of unlawful command influence falls short if it "fails to take into consideration the concern of Congress and this Court in eliminating even the appearance of unlawful command influence at courts-martial." Id.; see United States v. Ayers, 54 M.J. 85, 94-95 (2000), quoting United States v. Allen, 33 M.J. 209, 212 (CMA 1991) ("The appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial.").

^{HN7} The question whether there is an appearance of unlawful command influence is similar in one respect to the question whether there is implied bias, because both are judged objectively, through the eyes of the community. In the implied bias area, this Court has recognized that "observation of the member's demeanor may inform judgments" about the public perception of the fairness of a trial. United States v. Downing, 56 M.J. 419, 422 (2002). ^{HN8} While demeanor is "[a] measure of actual bias," it is "also relevant to an objective observer's consideration." Id. at 423. **[**25]** On an issue as sensitive as unlawful command influence, evaluation of demeanor of the court members as well as other witnesses, viewed through the prism of Biagase and the presumption of prejudice, is critical to evaluate whether there is an objective appearance of unfairness. Even if there was no

actual unlawful command influence, [*43] there may be a question whether the influence of command placed an "intolerable strain on public perception of the military justice system." See United States v. Wiesen, 56 M.J. 172, 175 (2001). For these reasons, we conclude that a hearing before a military judge is necessary to resolve appellant's claim of unlawful command influence.

Decision

The decision of the United States Army Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Army for submission to a convening authority for a hearing on appellant's claim of unlawful command influence under United States v. DuBay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967). If a hearing is impracticable, the convening authority may set aside the findings and sentence and order a rehearing or dismiss the charges. If a hearing is [**26] conducted, the record of trial, including the hearing, will then be transmitted to the Court of Criminal Appeals for review under Article 66, UCMJ, 10 USC § 866. Thereafter, Article 67, UCMJ, 10 USC § 867, shall apply.

CONCURBY: SULLIVAN

CONCUR: SULLIVAN, Senior Judge (concurring):

I agree with the majority. This is consistent with my position in United States v. Youngblood, 47 M.J. 338, 342-43 (1997)(Sullivan, J., concurring in part and dissenting in part) (the real issue is unlawful command influence, not jury bias).

DISSENTBY: CRAWFORD

DISSENT: CRAWFORD, Chief Judge (dissenting):

The majority chastises the military judge because she did not make "findings of fact and conclusions of law, nor did she analyze the evidence in accordance with the Biagase framework." MJ at (15). I do not find this "failure" surprising or erroneous since the court-martial that tried appellant took place fifteen months before this Court rendered its decision in United States v. Biagase, 50 M.J. 143 (1999), setting forth a framework for analyzing questions of unlawful command influence. Although the clairvoyance [**27] which the majority apparently demands of trial judges was not present in this case, I believe the trial judge properly applied the law in rejecting appellant's challenge to those members who were subjected to COL Brook's e-mail and December 23, 1997, leadership class.

At the time of trial, the law was clear. As with pretrial publicity, see Sheppard v. Maxwell, 384 U.S. 333, 16 L. Ed. 2d 600, 86 S. Ct. 1507, 6 Ohio Misc. 231, 35 Ohio Op. 2d 431 (1966), the party raising an unlawful command influence motion had to show the impact on the jurors or panel members. United States v. Thomas, 22 M.J. 388 (CMA 1986). Where there was an allegation of command influence,

an appellant [had to] (1) 'allege[] sufficient facts which, if true, constitute unlawful command influence'; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the proximate cause of that [alleged] unfairness.

United States v. Stombaugh, 40 M.J. 208, 213 (CMA 1994), citing United States v. Levite, 25 M.J. 334, 341 (CMA 1987)(Cox, J., concurring); see also United States v. Lorenzen, 47 M.J. 8, 15 (1997).

We made it crystal clear in Thomas, supra at **[**28]** 396, that

in determining whether an accused's trial in a contested case before court members was adversely affected by command influence, we first consider the impact that such activities and communications may have had on the court members. In this regard, we place the burden upon both defense and trial counsel, as well as the military judge, to fully question the court members during voir dire and to determine thereby whether any of the members had knowledge of the commander's comments and, if so, whether the comments had an adverse impact on the member's ability to render an impartial judgment. When required, witnesses may be called to testify on this issue. United States v. Karlson, 16 M.J. 469 (CMA 1983). However, we are not prepared to disqualify members of a court-martial panel simply because they were assigned or were in close proximity to the command where the comments were made. To do so would ignore the members' oath to adhere to the military judge's instructions and to determine the facts in accordance therewith. Cf. United States v. Garwood, 20 M.J. 148 (CMA 1985).

[*44] VOIR DIRE

The judge permitted an extensive voir dire **[**29]** of all the members. In the preliminary instructions, the judge reminded the members that their decision should be based on the law and instructions given during the case that appellant was presumed to be innocent and the Government had the burden of proof. Lieutenant Colonel (LTC) Withers, LTC Saul, LTC Moody, Master Sergeant (MSG) Peele, and Command Sergeant Major (CSM) Pagan indicated they were aware of e-mail messages from the First Brigade. All of the members also indicated they were not "aware of anything at all that might raise a substantial question concerning [their] participation in this trial as a court member."

On individual voir dire, LTC Saul stated that he remembered the first e-mail message from COL Brook but did not "recall the specifics." He remembered that this e-mail was aimed at "tightening up of the chain of command and enforcement of discipline and standards" His recollection was that "there was the appearance of a lack of law and order and discipline among certain elements of the brigade." As to the "certain elements," he meant "enlisted personnel and noncommissioned officers." He stated that he "saw the second message . . . but [did not] recall **[**30]** any specific points in the second message." He did not read the e-mail as an "exhortation to . . . be tough in this case." He agreed that any decision must be based on the evidence presented and the judge's instructions, and that such instructions override any information received from the brigade commander. He would not "bump" up the punishment, but would base it only on the evidence presented. As the majority notes, LTC Saul was challenged for cause, and the military judge granted that challenge.

LTC Withers, as did LTC Saul, responded to voir dire questions based on recollection, without that recollection being refreshed by the e-mails. He emphasized that the e-mails were aimed at "urging leaders not to accept substandard performance. . . ." He said the follow-up e-mail was meant to "clarify his statement, I think the real key statement was the one to squash people who did something wrong. It was not in any way, shape or form, intended to make us -- or to inhibit his subordinates in the proper handling of UCMJ and other legal matters." "Sitting as a member," there was nothing in the e-mail messages that would cause him "to hesitate in fulfilling [his] duty as a court member. **[**31]** " He would not be concerned about what COL Brook would think about his performance in this case or any other case. He would not be influenced by the e-mail because

[COL] Brook is a very impassioned man; he holds his values very high; he shoots from the hip; he knows he shoots from the hip. I had talked to him about that and a wide variety of subjects. I've been in the Army long enough to have seen statements like that before; and quite frankly I've been in the Army so long that I'm not really concerned at this point what my rater thinks; I'm going to do what I think is right, because that's what I've done all my career.

After that response, the defense counsel had no more questions.

As the majority notes, LTC Moody indicated that he read the e-mail in a cursory manner and did not attend the follow-up briefing. Major (MAJ) Fields, another court member, did not have any information about the e-mails.

The brigade's top noncommissioned officer, CSM Pagan, stated that he saw a lot of e-mail on a daily basis, and that he did not remember that e-mail conveying anything about his responsibilities as a court member. He saw the second e-mail but did not recall it. He added:
[**32]

You know, I've worked for quite a few brigade commanders since being a Command Sergeant Major, and knowing Colonel Brook, as well as those other commanders in the past; I tell you, knowing him, when he sent out that e-mail message and when he talked to soldiers he was looking after the welfare of the leaders, as well as the soldiers, and trying to keep them from getting themselves into trouble; and that was his thoughts on that.

[*45] * * *

MJ [MILITARY JUDGE]: Sergeant Major, it looks like we've got some civilians sitting in the back of the courtroom; I know that you received this message and have had the briefing; how can you assure them that you'll be a fair and impartial court member?

MBR [CSM PAGAN]: Well, I've been a fair and impartial member of the United States Army, as well as my nation, serving for close to 25 years; and I'm not one to be swayed, I'm not one to comply with something just because somebody else said it. I'll stick by my guns and come to the conclusion that I feel is appropriate; no matter who's in that group, or in this members [sic] of the jury; I will take all the information that's given to me, make a rational decision, evaluate all that [**33] information, and I will make the best decision that I see possible with that information, and listening to others that have an opinion on that subject.

CSM Pagan had a follow-up briefing with the noncommissioned officers of his brigade following COL Brook's briefing. He could not remember the exact words he used during the briefing, "but it was about basically ensuring that they did the right things, talk to their soldiers, mentored their leaders." Compared to the 10th Mountain Division, where he was a Battalion Sergeant Major, the instances of misconduct in his current brigade were "very small." After being read part of the e-mail, CSM Pagan said COL Brook was shooting from the hip and "overreacted." CSM Pagan further stated:

He was really looking after the - trying to look after the soldiers, by making sure

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that he, kind of, emphasized to the leaders "Hey, I want you to be proactive, I want you to go out there and talk to your soldiers, I want you to make sure that you're communicating with your subordinates, because that will keep soldiers out of trouble." That's what he really wanted to say. He was a little more strong in his method of delivery there, but. . . .

[34]**

The military judge also sustained appellant's causal challenge of CSM Pagan.

MSG Peele did not interpret the December briefing as a need to be tough as a court member. He thought there were more important issues than DUI. He received the first message but did not read it "because [he] knew those things already." He did not receive the second e-mail. Obviously, the messages had no effect on him.

MSG Geyer, another court member, responded that he could set aside any pretrial knowledge about the case he had gained from the media and base his decision solely on the evidence introduced at trial. He did not receive the first e-mail because he was not assigned to COL Brook's brigade. Although MSG Geyer was the only noncommissioned officer not exposed to the brigade commander's written or oral remarks, he was successfully challenged by the defense.

Sergeant First Class (SFC) Robbins, a member of appellant's battalion, said he did not see either e-mail but he did attend a leader's training briefing on December 23, 1997. As noted by the majority, SFC Robbins stated that the session had no bearing on his court-martial duties.

DISCUSSION

The majority errs in two significant ways. **[**35]** First, it indicates that the burden on the defense is merely to present "some evidence," and that alone is sufficient to raise command influence. MJ at (14). While the majority gives no indication whether "some" means colorable evidence or a different evidentiary standard, Stombaugh makes it clear that more than "some evidence" is required to shift the burden to the Government. 40 M.J. at 213. We have previously rejected "[command influence] in the air," United States v. Allen, 33 M.J. 209, 212 (CMA 1991), cert. denied, 503 U.S. 936, 117 L. Ed. 2d 617, 112 S. Ct. 1473 (1992), yet the majority's definition of "some evidence" would certainly encompass such ethereal notions. Stombaugh, however, required an appellant to "allege[] sufficient facts which, if true, constitute unlawful command influence" before any burden **[*46]** shifted to the Government to disprove the facts or show that the facts did not constitute command influence. 40 M.J. at 213, quoting Levite, 25 M.J. at 341 (Cox, J., concurring). Appellant has failed to clear the first hurdle.

Even under the Biagase standard, the defense is required to do more than raise an **[**36]** allegation of unlawful command influence. It must "show facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." 50 M.J. at 150.

Second, the majority stretches the holding of Thomas, 22 M.J. at 388, beyond its intended limits by implying that witnesses are required to testify on the issue of command influence.

MJ at (13). Thomas established no such requirement. However, in looking at the statements given by the prospective court members under oath during voir dire, I conclude that the trial judge was in the best position to observe the court members' demeanor during their examination under oath; to evaluate their answers; and to determine who was and who

was not improperly and adversely affected by COL Brook. That military judge's ruling denying a challenge for cause ought to be overturned only for a clear abuse of discretion. See United States v. Downing, 56 M.J. 419, 423 (2002)(Crawford, C.J., concurring in part and in the result); United States v. Wiesen, 56 M.J. 172, 177 (2001) **[**37]** (Crawford, C.J., dissenting)(pet. for recon. filed Dec. 21, 2001).

All the members swore that their decision would be based on the evidence presented and the judge's instructions. Under oath, they indicated they were not aware of anything at all that might raise a substantial question concerning their participation in this trial as court members. We do not need to dismiss their sworn responses so effortlessly, especially when one looks at the extensive voir dire in the context of this case and defense tactics. After appellant's causal challenge of all 1st Brigade members was denied, the member challenged by the defense peremptorily (MSG Geyer) was one who did not know of COL Brook's e-mail.

Finally, the majority is wrong when it criticizes the trial judge for not making "findings of fact and conclusions of law, nor . . . analyzing the evidence in accordance with the Biagase framework." MJ at (15). Biagase does not require a military judge to make findings of fact and conclusions of law. Additionally, that rule is not to be found in any of the cases from this Court that had been decided at the time of appellant's court-martial.

CONCLUSION

The thrust **[**38]** of COL Brook's e-mail, despite its bombastic tone, was to enhance leadership, eliminate noncommissioned officer incidents of drunk driving, encourage leaders to set a good example, and incorporate single and recently arrived soldiers in unit activities. A good digest of the e-mails can be found in the Army Court of Criminal Appeals opinion. 54 M.J. at 671-72.

Notwithstanding appellant's failure to show sufficient facts that constituted improper command influence, the Government "produced" evidence during voir dire by showing that none of the e-mails had any impact on the members. This was reinforced by the members saying that the brigade commander was shooting from the hip. Three of the members testified that COL Brook had no business telling them what their duties were as court members, and that he (COL Brook) did not have the same set of values as they. See, e.g., LTC Withers's voir dire responses, supra at (4). Said differently by MSG Peele when talking about COL Brook's December 23 briefing and email: "I don't need a Colonel to tell me how to do my duties, ma'am, I can do them on my own; and I think he could take a message from me."

Finally, this **[**39]** is a good case to show the importance of remedial action by a staff judge advocate -- the type of action which the majority discourages with their holding. Once the staff judge advocate discovered that COL Brook had sent the first e-mail to members of his command, he ensured that remedial action was taken through the second e-mail. **[*47]** The remedial action of the second e-mail put the first e-mail in perspective. As COL Brook said in his second e-mail:

Let me make something else perfectly clear. Nothing in what I have said in this or the earlier e-mail, or what I said at the Leader Training, has anything to do with what any soldier does as a member of a court-martial panel or as a witness before a court-martial. The sworn duty of any court-martial panel member is to follow the instructions of the military judge, apply law to admissible facts, and decide a sentence based solely on the evidence presented in court. Nothing said outside a court-martial by anybody, TO INCLUDE ME, may have any bearing on the outcome of any given case or sentence.

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54 M.J. at 678.

Whether this case is decided under pre-Biagase law or that set forth in Biagase, appellant has **[**40]** failed to prove or produce the quantum of evidence required to raise the issue of unlawful command influence and, thus, shift the burden to the Government to refute the facts, to show that the facts do not constitute unlawful command influence, or that command influence did not taint the proceedings.

For these reasons, I dissent.

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58 M.J. 253, *; 2003 CAAF LEXIS 537, **

UNITED STATES, Appellee v. Daniel A. DUGAN, Airman, U.S. Air Force, Appellant

No. 02-0561

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

58 M.J. 253; 2003 CAAF LEXIS 537

December 10, 2002, Argued

June 2, 2003, Decided

PRIOR HISTORY: **[**1]** Crim. App. No. 34477. Military Judge: Mary M. Boone. United States v. Dugan, 2002 CCA LEXIS 69 (A.F.C.C.A., Mar. 20, 2002)

DISPOSITION: Affirmed in part and set aside in part and remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Pursuant to mixed pleas, defendant was convicted on several charges, inter alia, wrongful use of the drug commonly known as ecstasy, violation of Unif. Code Mil. Justice art. 86, 112a, and 134, 10 U.S.C.S. §§ 886, 912a, and 934. The United States Air Force Court of Criminal Appeals affirmed the findings and sentence and defendant appealed.

OVERVIEW: Defendant claimed that improper, extraneous factors influenced the deliberations of the members of the court-martial. One of the members had written a letter expressing her concerns, the first of which was that other court members did not believe that defendant's mental condition was a mitigating factor in sentencing. However, the members were free to assign to defendant's mental condition whatever weight they chose, including no weight at all. A second concern was that other members may have been influenced by one member's statement that defendant would be enrolled in a substance abuse program if he was sentenced to confinement. This was not extraneous, prejudicial information but simply personal knowledge that a member brought into the deliberative process. The final concerns related to whether some members may have based defendant's sentence on a concern that they would have been viewed unfavorably by the convening authority (their commanding officer) if they did not impose a sentence harsh enough to be "consistent" with the convening authority's "message" at a recent Commander's Call that drug use was incompatible with military service. This issue warranted a DuBay hearing.

OUTCOME: The military appellate court affirmed the lower court's decision as to findings but set the decision aside as to sentence. The matter was remanded for a factfinding hearing on defendant's claim of unlawful command influence. If a hearing were impracticable, the convening authority was authorized to set aside the sentence and order a sentence rehearing.

CORE TERMS: sentence, court-martial, command influence, convening, commander, military, deliberation, defense counsel, deliberative process, drug use, confinement, voir dire, attended, military service, extraneous, impeach, post-trial, sentenced, juror's, sentencing

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phase, prejudicial, message, emotions, bad-conduct, admissible, timing, outside influence, substance abuse program, appropriate sentence, mental process


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HN1  Long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry. As a result, deliberations of court-martial members ordinarily are not subject to disclosure. R.C.M. 923, Manual Courts-Martial, discussion. The purpose of this rule is to protect freedom of deliberation, protect the stability and finality of verdicts, and protect court members from annoyance and embarrassment. [More Like This Headnote](#)


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HN2  See Mil. R. Evid. 606(b).


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HN3  Under Mil. R. Evid. 606(b), there are three circumstances that justify piercing the otherwise inviolate deliberative process to impeach a verdict or sentence: (1) when extraneous information has been improperly brought to the attention of the court members; (2) when outside influence has been brought to bear on a member; and (3) when unlawful command influence has occurred. [More Like This Headnote](#)


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HN4  Internal matters regarding the deliberations of the members of the court-martial on sentence cannot be inquired into post-trial. Mil. R. Evid. 606 (b). [More Like This Headnote](#)

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HN5  Evidence of information acquired by a court member during deliberations from a third party or from outside reference materials may be extraneous prejudicial information which is admissible under Mil. R. Evid. 606(b) to impeach the findings or sentence. However, the general and common knowledge a court member brings to deliberations is an intrinsic part of the deliberative process, and evidence about that knowledge is not competent evidence to impeach the members' findings or sentence. [More Like This Headnote](#)

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HN6  In military law, at trial and on appeal, the defense has the initial burden of producing sufficient evidence to raise unlawful command influence. The burden of proof is low, but more than mere allegation or speculation. The quantum of evidence required to raise unlawful command influence is "some evidence." At trial, an accused must show facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings. On appeal, an appellant must (1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the cause of the unfairness. [More Like This Headnote](#)


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HN7  The United States Court of Criminal Appeals for the Armed Forces has long held that the use of command meetings to purposefully influence the members in determining a court-martial sentence constitutes unlawful command influence in violation of Unif. Code Mil. Justice art. 37, 10 U.S.C.S. § 837. Regardless of a commander's intent, the mere "confluence" of the timing of such meetings with members during ongoing courts-martials and their subject matter dealing with court-martial sentences can require a sentence rehearing. [More Like This Headnote](#)


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HN8  See Unif. Code Mil. Justice art. 37, 10 U.S.C.S. § 837.


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[Evidence](#) > [Procedural Considerations](#) > [Burdens of Proof](#) 


HN9  In military law, where an appellant has successfully raised the issue of unlawful command influence, it is the government that must rebut the presumption of unlawful command influence: (1) by disproving the predicate facts on which the allegation of unlawful command influence is based; (2) by persuading a judge at a DuBay hearing that the facts do not constitute unlawful command influence; or (3) by persuading the DuBay judge that the unlawful command influence had no prejudicial impact on the court-martial. Whichever tactic the government chooses, the quantum of evidence required is proof beyond a reasonable doubt. [More Like This Headnote](#)


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HN10  In military law, when unlawful command influence has been directed at court members, the government's third option under Biagase is limited by Mil. R. Evid. 606(b). This rule prohibits inquiry into two types of matters: (1) any matter or statement occurring during the course of the deliberations; and (2) the effect of anything upon a member's or any other member's mind or emotions as influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith. The rule has three exceptions to the first prohibition, one of which permits testimony about any matter or statement occurring during the deliberations when there is a question whether there was unlawful command influence. The exceptions, however, do not permit circumvention of the second prohibition (inquiry into the effect on a member). [More Like This Headnote](#)

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HN11  In military law, in a claim of undue command influence, Mil. R. Evid. 606(b) permits voir dire of court-martial members regarding what was said during deliberations about a commander's comments, but the members may not be questioned regarding the impact of any member's statements or the commander's comments on any member's mind, emotions, or mental processes. [More Like This Headnote](#)

COUNSEL: For Appellant: Major Kyle R. Jacobson (argued); Colonel Beverly B. Knott and Major Terry L. McElyea (on brief); Major Jeffrey A. Vires.

For Appellee: Lieutenant Colonel Lance B. Sigmon (argued); Lieutenant Colonel LeEllen Coacher (on brief); Colonel Anthony P. Datillo.

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JUDGES: CRAWFORD, C.J., delivered the opinion of the Court, in which GIERKE, EFFRON, BAKER, and ERDMANN, JJ., joined.

OPINIONBY: CRAWFORD

OPINION: [*253] Chief Judge CRAWFORD delivered the opinion of the Court.

Pursuant to mixed pleas, Appellant was convicted by a general court-martial of failure to go to his appointed place of duty, [*254] unauthorized absence, wrongful use of the drug commonly known as ecstasy, dishonorable failure to pay a just debt, and wrongful use and possession of a false military identification card, in violation of Articles 86, 112a, and 134, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 886, 912a, and 934, respectively. Appellant was sentenced by a panel of officer members to a bad-conduct discharge, confinement for nine months, total forfeitures, [**2] and reduction to E-1. The convening authority reduced the forfeitures but otherwise approved this sentence. The Air Force Court of Criminal Appeals affirmed the findings and sentence in an unpublished opinion. United States v. Dugan, 2002 CCA LEXIS 69, No. ACM 34477 (A.F. Ct. Crim. App. March 20, 2002).

This Court specified the following issues for review:

I

WHETHER A COURT MEMBER'S ALLEGATIONS REGARDING STATEMENTS MADE BY OTHER COURT MEMBERS DURING SENTENCE DELIBERATION REASONABLY RAISES A QUESTION AS TO "WHETHER EXTRANEOUS PREJUDICIAL INFORMATION WAS IMPROPERLY BROUGHT TO THE ATTENTION OF THE MEMBERS OF THE COURT-MARTIAL, WHETHER ANY OUTSIDE INFLUENCE WAS IMPROPERLY BROUGHT TO BEAR ON ANY MEMBER, OR WHETHER THERE WAS UNLAWFUL COMMAND INFLUENCE." MILITARY RULE OF EVIDENCE 606(b).

II

IF SO, WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY NOT CONDUCTING A POST-TRIAL SESSION UNDER ARTICLE 39(a), UCMJ, 10 U.S.C. § 839(a) (2000), TO INQUIRE INTO THE VALIDITY OF APPELLANT'S SENTENCE IN LIGHT OF THE ALLEGATIONS.

For the reasons that follow, we remand this case for a factfinding hearing pursuant to United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (1967). [**3]

Factual Background

Several weeks before Appellant's court-martial, the convening authority held a Commander's Call, at which many of the convening authority's subordinate commanders were present. One of the things the convening authority spoke about at that meeting was military justice, and exactly what he said became a topic of voir dire at Appellant's court-martial.

During group voir dire of the nine original court members, the military judge asked: "Does any member, having read these Charges and Specifications, believe that you would be

compelled to vote for any particular punishment, solely because of the nature of these offenses?" All the members responded in the negative. The military judge then further asked: "Can each of you be fair, impartial, [and] open-minded in your consideration of an appropriate sentence?" All the members responded in the affirmative. Trial defense counsel also asked the members: "Do any of you feel that such an offense, using ecstasy, would require a specific punishment?" Again, they all responded in the negative.

Thereafter, trial defense counsel asked them: "Was anyone - did anyone here attend [the convening authority's] Commander's Call **[**4]** several weeks ago?" In answer, four members stated they attended the meeting and five stated they did not. The four who attended were Colonel (Col) Berry, Lieutenant Colonel (LtCol) Spence, LtCol Freeman, and Major (Maj) Robertson. Following up on these responses, trial defense counsel questioned Col Berry and LtCol Spence individually about the Commander's Call. LtCol Freeman and Maj Robertson were not questioned individually about this subject.

As to Col Berry, trial defense counsel asked: "The Commander's Call that you went to . . . do you remember [the convening authority] mentioning anything about drug use on base?" Col Berry answered: "Yes, **[*255]** he was very emphatic about - and I don't think he used these words - but, essentially, that drug use was inconsistent with military service." As to LtCol Spence, trial defense counsel asked: "[The] Commander's Call that you went to a couple of weeks ago. Do you remember if he said anything about drug use?" LtCol Spence answered: "'It seems like it's prevalent here on the Gulf Coast.' I'm going to assume that he did the normal commander thing and then said, 'It's not compatible with military service.'"

In response to further questioning **[**5]** by trial defense counsel, Col Berry and LtCol Spence each indicated that no specific reference was made at the Commander's Call to Appellant or his impending court-martial.

At the conclusion of individual voir dire, three court members were challenged off the panel, including Col Berry. This left six court members to hear the contested portion of the case and then to adjudge an appropriate sentence. Of those six, three attended the Commander's Call, including LtCol Spence, who served as the president of the court-martial panel. The other three panel members did not attend the meeting, and a post-trial letter written by one of them - Second Lieutenant (2Lt) Greer - lies at the heart of this appeal. n1

- - - - - Footnotes - - - - -

n1 The letter was neither signed nor sworn to by 2Lt Greer. Nonetheless, during oral argument, the Government agreed it could be treated as such.

- - - - - End Footnotes - - - - -

After appellant's court-martial, 2Lt Greer, the junior member of the court-martial panel, provided trial defense counsel a letter for submission to the convening authority **[**6]** as part of Appellant's request for clemency. n2 The letter described four concerns 2Lt Greer had regarding the panel members' sentencing deliberations. First, she worried that "everyone did not agree that [Appellant's mental illness] should be considered as a mitigating factor." n3 Second, she believed that because one member stated Appellant would be enrolled in a substance abuse program if he was further confined, n4 the other members "took it as fact and used it in their decision making process." Third, she noted that "a couple of panel members expressed the notion that a Bad Conduct Discharge was a 'given' for a person with these charges[.]"

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n2 See Rules for Courts-Martial 1105, 1107 (convening authority must consider clemency matters submitted by accused before taking final action on sentence).

n3 A defense expert testified that Appellant suffered from post-traumatic stress disorder as a result of a brutal assault he experienced, and that he could not be effectively treated while in confinement.

n4 Appellant served 150 days of pretrial confinement before his court-martial commenced.

- - - - - End Footnotes- - - - - **[**7]**

Finally, 2Lt Greer found "most disconcerting . . . the mention of a recent Commander's Call in which [the convening authority] was said to have discussed the increasing problem of Ecstasy use[.]" In that regard, she wrote:

[A] panel member reminded us that our sentence would be reviewed by the convening authority and we needed to make sure our sentence was sending a consistent message. Another member pointed out that we needed to make sure it didn't look like we took the charges too lightly because those reviewing our sentence wouldn't necessarily be aware of the mitigating factors. He or she said it was especially important because our names would be identified as panel members.

Procedural Background

Having received this letter, trial defense counsel requested that the military judge convene a post-trial session pursuant to Article 39(a) so the defense could question the members about these matters. The military judge denied the request, however, and ruled as follows:

That some members may have concluded [the accused's mental illness] deserved less weight than 2Lt Greer does not warrant such an invasion into their deliberative process. Also, that **[**8]** some member(s) might think that lengthier confinement might provide the accused with more treatment options is again a deliberative process this court does not feel appropriate to invade. Similarly, after having heard all of the **[*256]** facts in this case, if some members felt a bad conduct discharge was a "given" in this case, that does not impeach their responses during voir dire that they were not predisposed to giving such a sentence. . . .

. . . There is no evidence that anyone within the panel exerted any command influence over any other panel member[,], and any references to [the convening authority's Commander's Call] during the deliberative process did not appear to chill the deliberative process. . . . This court does not find it appropriate to violate the sanctity of the deliberative process based upon the statement provided by 2Lt Greer.

At the Court of Criminal Appeals, Appellant "conceded that most of the 'areas of concern' in the [letter] do not call into question the validity of his sentence." Dugan, 2002 CCA LEXIS 69, *7, No. ACM 34477. However, he asserted that the letter "raises the issue of unlawful command influence and that the [military] judge erred by failing [**9] to convene a post-trial hearing." 2002 CCA LEXIS 69 at *5. He therefore requested a DuBay hearing on the matter to determine the validity of the sentence. The Court of Criminal Appeals denied that request, concluding there was "no evidence of command influence." 2002 CCA LEXIS 69 at *12. In doing so, that court stated:

The convening authority repeated what everyone in the Air Force has heard many times before, that drug use is incompatible with military service. The issue before us is whether there is any evidence that the convening authority's purpose in repeating this often used phrase at a command meeting was to influence the court members.

. . . The convening authority informed the attendees that drug use was prevalent on the gulf coast of Florida, and that it was incompatible with military service. Neither of these assertions is novel or shocking, and common sense tells us that they were not intended to influence the outcome of any court-martial.

We also find that the alleged comments that the convening authority would know their names and review the sentence, and that the sentence should not appear to be too lenient, do not support the Appellant's claim of unlawful command influence. [**10] Rather, they reflect the reality of the military justice system . . . Court members know the convening authority selects them to serve on the court-martial and reviews the sentence.

. . . The convening authority's exercise of his statutory responsibility and the members' awareness of that role, without more, does not amount to unlawful command influence because no policy or preference can be imputed to the commander for doing what he is required to do.

2002 CCA LEXIS 69 at *11-12 (citations omitted).

Discussion

1. Introduction

HN1 ¶ "Long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry." Tanner v. United States, 483 U.S. 107, 127, 97 L. Ed. 2d 90, 107 S. Ct. 2739 (1987). As a result, "deliberations of [court-martial] members ordinarily are not subject to disclosure." Rule for Courts-Martial [hereinafter R.C.M.] 923 discussion. "The purpose of this rule is to protect freedom of deliberation, protect the stability and finality of verdicts, and protect court members from annoyance and embarrassment." United States v. Loving, 41 M.J. 213, 236 (C.A.A.F. 1994) (internal quotations omitted).

Like its counterpart in [**11] the federal civilian system, Military Rule of Evidence 606(b) [hereinafter M.R.E.] implements this rule by stating:

HN2 ¶

Upon an inquiry into the validity of the findings or sentence, a member may not testify as to any matter or statement occurring during the course of the

deliberations of the members of the court-martial or, to the effect of anything upon the member's or any other member's mind or emotions as influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith, except that a member may testify on the question [1] whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial, [2] **[*257]** whether any outside influence was improperly brought to bear upon any member, or [3] whether there was unlawful command influence. Nor may the member's affidavit or evidence of any statement by the member concerning a matter about which the member would be precluded from testifying be received for these purposes.

See also Fed. R. Evid. 606(b) (identical to M.R.E. 606(b) other than reference to military issue of unlawful command influence); **[**12]** R.C.M. 923, 1008 (standard for impeachment of findings and sentence).

Thus, ^{HN3} under M.R.E. 606(b), there are three circumstances that justify piercing the otherwise inviolate deliberative process to impeach a verdict or sentence: "(1) when extraneous information has been improperly brought to the attention of the court members; (2) when outside influence has been brought to bear on a member; and (3) when unlawful command influence has occurred." United States v. Accordino, 20 M.J. 102, 104 (C.M.A. 1985). Appellant's case involves the first and third of these categories.

2. Extraneous Information

The first two concerns 2Lt Greer expressed in her letter were: (1) other court members did not believe, as she did, that Appellant's mental condition was a mitigating factor to consider when determining an appropriate sentence, and (2) other court members may have been influenced by one member's statement that Appellant would be enrolled in a substance abuse program if he was sentenced to confinement. As to the first of these concerns, we agree with the military judge that the members were free to assign to Appellant's mental condition whatever weight they chose, including **[**13]** no weight at all. Such a decision "raises [nothing] other than ^{HN4} internal matters regarding the deliberations of the members of the court-martial on sentence" and, therefore, cannot be inquired into post-trial. United States v. Straight, 42 M.J. 244, 250 (C.A.A.F. 1995); see M.R.E. 606(b).

Regarding the possibility that one of the members informed the others that Appellant would be enrolled in a substance abuse program if sentenced to confinement, appellate defense counsel argues this was "extraneous prejudicial information" within the meaning of M.R.E. 606(b) because "if relied upon," the members "would increase the term of confinement they would otherwise impose in order to 'help' Appellant[.]" This, counsel argues, calls into question the validity of Appellant's sentence and justifies a rehearing. We disagree.

In Straight, we stated:

^{HN5} Evidence of information acquired by a court member during deliberations from a third party or from outside reference materials may be extraneous prejudicial information which is admissible under [M.R.E.] 606(b) to impeach the findings or sentence. [However], the general and common knowledge a court member brings **[**14]** to deliberations is an intrinsic part of the deliberative process, and evidence about that knowledge is not competent evidence to impeach the members' findings or sentence.

42 M.J. at 250.

Here, even if one member did tell the others that Appellant would receive substance abuse counseling if sentenced to confinement, and even if the others did factor that into their sentence determination, it would not involve extraneous prejudicial information. To the contrary, it "would fall squarely within the deliberative process which is protected by [M.R.E.] 606(b)." United States v. Combs, 41 M.J. 400, 401 (C.A.A.F. 1995)(court member's statement that sentence would have been less if appellant had cooperated with police was not competent evidence to impeach sentence). Thus, it cannot be considered by this or any other court as impeaching the validity of Appellant's sentence. See McDowell v. Calderon, 107 F.3d 1351, 1366-67 (9th Cir. 1997)(juror's statement to other jurors about parole consequences of sentence not admissible under Fed. R. Evid. 606(b)); Silagy v. Peters, 905 F.2d 986, 1008-09 (7th Cir. 1990)(juror's statements **[**15]** to other jurors about impact of death versus life sentence on actual time served not admissible under Fed. R. Evid. 606(b)); United States v. Motsinger, 34 M.J. 255, 257 (C.M.A. 1992)(letter from court-martial **[*258]** president concerning reasons for imposing bad-conduct discharge "may not be considered").

3. Unlawful Command Influence

The third and fourth concerns expressed by 2Lt Greer in her letter were: (1) some members stated a bad-conduct discharge was a "given" in this case, and (2) some members made statements suggesting they were influenced by the message put out by the convening authority at his Commander's Call. As to these concerns, we conclude they make a DuBay hearing necessary to determine whether unlawful command influence existed during the sentencing phase of Appellant's court-martial. Under the circumstances of this case, such statements fall squarely within the "unlawful command influence" exception of M.R.E. 606(b) and are not protected from disclosure.

We begin by noting that to the extent the military judge and the Court of Criminal Appeals concluded Appellant did not meet his initial burden of raising the issue of unlawful command influence, **[**16]** they erred. ^{HN6}At trial and on appeal, "the defense has the initial burden of producing sufficient evidence to raise unlawful command influence." United States v. Ayala, 43 M.J. 296, 299 (C.A.A.F. 1995). "The burden of proof is low, but more than mere allegation or speculation. The quantum of evidence required to raise unlawful command influence is 'some evidence.'" United States v. Stoneman, 57 M.J. 35, 41 (C.A.A.F. 2002) (quoting United States v. Biagase, 50 M.J. 143, 150 (C.A.A.F. 1999)).

"At trial, the accused must show facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." Biagase, 50 M.J. at 150. On appeal, an appellant must "(1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the cause of the unfairness." *Id.* (citing United States v. Stombaugh, 40 M.J. 208, 213 (C.M.A. 1994)). The defense has met its burden in this **[**17]** appeal.

^{HN7}"We have long held that the use of command meetings to purposefully influence the members in determining a court-martial sentence" constitutes unlawful command influence in violation of Article 37, UCMJ, 10 U.S.C. § 837 (2000). ⁿ⁵ United States v. Baldwin, 54 M.J. 308, 310 (C.A.A.F. 2001). We also have held that regardless of a commander's intent, "the mere 'confluence' of the timing of such meetings with members during ongoing courts-martials and their subject matter dealing with court-martial sentences can require a sentence rehearing." *Id.* Thus, in United States v. Brice, 19 M.J. 170 (C.M.A. 1985), we reversed and

remanded for a new trial because the members of an ongoing court-martial attended a Commandant's meeting where drug problems in the military were discussed. In doing so, however, we also stated:

We do not in any way wish to be viewed as condemning the contents of the Commandant's remarks since the drug problem in the military demands command attention; nor do we feel that such remarks necessarily constitute illegal command influence. Instead, we base our decision on the confluence of subject and **[**18]** timing, particularly as they affect the minds - however subtly or imperceptibly - of the triers of fact[.]

Id. at 172 n.3 (citing United States v. Grady, 15 M.J. 275, 276 (C.M.A. 1983)).

----- Footnotes -----

n5 ^{HNS}Article 37, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 837 (2000), states: "No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . or any member thereof, in reaching the findings or sentence in any case[.]"

----- End Footnotes-----

With these principles in mind, we turn now to Appellant's case. At the outset, we note there is nothing in 2Lt Greer's letter to indicate the convening authority had any improper intent when he conducted the Commander's Call, or that he purposefully used that meeting to influence Appellant's or any other court-martial. Nor does the record in its current form contain any other evidence **[*259]** suggesting such an intent or design on the part of the convening authority. **[**19]** As a result, we have no reason presently to question either the lawfulness of the Commander's Call or the correctness of the Court of Criminal Appeals's finding that the content of the Commander's Call was "neither . . . novel or shocking."

We also recognize that Appellant's court-martial took place several weeks after the Commander's Call, in stark contrast to the Baldwin and Brice cases, where court members attended command meetings while they were actually sitting as court-martial panels. We are therefore mindful that to the extent the timing of such meetings -- coupled with their content -- alone gives rise to an inference of unlawful command influence, such an inference is not warranted in appellant's case, given the record as it now stands. n6

----- Footnotes -----

n6 We also recognize that Appellant's case, as in United States v. Brice, 19 M.J. 170 (C.M.A. 1985), involves both a court-martial for drug use and a command meeting dealing with drug use in the military.

----- End Footnotes-----

We hold, however, that 2Lt Greer's **[**20]** letter does constitute some evidence that

unlawful command influence may have taken place during the sentencing phase of Appellant's court-martial. 2Lt Greer's letter is more than mere speculation because it is "detailed" and "based on her own observations." Baldwin, 54 M.J. at 311. Moreover, it contains assertions which, if true, suggest that members of Appellant's court-martial who attended the Commander's Call unfairly based his sentence, at least in part, on a concern they would be viewed unfavorably by the convening authority (their commanding officer) if they did not impose a sentence harsh enough to be "consistent" with the convening authority's "message" at the Commander's Call that drug use is incompatible with military service.

Such a possibility we cannot ignore, for it is exactly this type of command presence in the deliberation room -- whether intended by the command or not -- that chills the members' independent judgment and deprives an accused of his or her constitutional right to a fair and impartial trial. For these reasons, we conclude that a DuBay hearing is necessary to determine whether unlawful command influence existed during the sentencing **[**21]** phase of Appellant's court-martial. Furthermore, ^{HN9} because Appellant has successfully raised the issue of unlawful command influence, it is the Government that must now rebut the presumption of unlawful command influence

(1) by disproving the predicate facts on which the allegation of unlawful command influence is based; (2) by persuading the [DuBay] judge . . . that the facts do not constitute unlawful command influence; . . . or [3] . . . by persuading the . . . [DuBay judge] that the unlawful command influence had no prejudicial impact on the court-martial.

Biagase, 50 M.J. at 151. "Whichever tactic the Government chooses, the quantum of evidence required is proof beyond a reasonable doubt." Stoneman, 57 M.J. at 41.

Having said that, we note that ^{HN10} when unlawful command influence has been directed at court members, the Government's third option under Biagase is limited by M.R.E. 606(b). This rule prohibits inquiry into two types of matters: (1) "any matter or statement occurring during the course of the deliberations," and (2) "the effect of anything upon [a] member's or any other member's mind or emotions as **[**22]** influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith[.]"

The rule has three exceptions to the first prohibition, one of which permits testimony about "any matter or statement" occurring during the deliberations when there is a "question whether . . . there was unlawful command influence." The exceptions, however, do not permit circumvention of the second prohibition (inquiry into the effect on a member). See Stephen A. Saltzburg, et al., *Military Rules of Evidence Manual* 722 (4th ed. 1997) ("Members may testify 'with respect to objective manifestations of impropriety' but may not testify 'if the alleged transgression is subjective in nature.'"); see also 3 Jack B. Weinstein & Margaret A. Berger, **[*260]** Weinstein's *Federal Evidence* § 606.04[2][c] (2d ed. 1997) (citing examples of subjective and objective evidence of impropriety).

Thus, in this case, ^{HN11} M.R.E. 606(b) permits voir dire of the members regarding what was said during deliberations about the commander's comments, but the members may not be questioned regarding the impact of any member's statements or the commander's **[**23]** comments on any member's mind, emotions, or mental processes.

If the military judge who presides at the DuBay hearing is not satisfied beyond a reasonable
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doubt that unlawful command influence did not exist during the sentencing phase of Appellant's court-martial, or that one or more members did not exert the influence of superior rank on a junior member or purport to wear the mantle of the convening authority by conveying to the other members his or her interpretation of the convening authority's message, that judge shall set aside Appellant's sentence and order a sentence rehearing. If, however, the military judge finds there were no infirmities in the sentencing process, he or she shall return the record, along with the military judge's findings of fact and conclusions of law, to the Court of Criminal Appeals for further review under Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2000).

Finally, in conducting the DuBay proceeding, the military judge shall not voir dire any member as to "the effect of anything upon [a] member's . . . mind or emotions as influencing [a] member to assent to or dissent from the findings or sentence or . . . [a] member's **[**24]** mental process in connection therewith." M.R.E. 606(b).

Decision

The decision of the United States Air Force Court of Criminal Appeals is affirmed as to findings but set aside as to sentence. The record of trial is returned to the Judge Advocate General of the Air Force for submission to a convening authority for a hearing on Appellant's claim of unlawful command influence. If a hearing is impracticable, the convening authority may set aside the sentence and order a sentence rehearing. If a hearing is conducted, the military judge shall make findings of fact and conclusions of law and then shall either order a sentence rehearing or return the record of trial to the Court of Criminal Appeals for further review consistent with this opinion.

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UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

)
)
) PROSECUTION RESPONSE TO
) DEFENSE MOTION FOR DISMISSAL
) (UNLAWFUL COMMAND
) INFLUENCE)
)
)
)

24 August 2004

1. Timeliness. This Prosecution response is being filed within the time frames and guidance established by Presiding Officer Memorandum (POM) 4-1.
2. Relief Sought. The Defense motion should be denied because there has been no coercion or unauthorized influence by the Appointing Authority upon the Military Commission in this case.
3. Facts in Agreement. The Prosecution concurs with the Defense's alleged facts.
4. Statement of Facts. The Prosecution alleges the following additional facts:
 - a. That on 29 July 2004, the Chief Defense Counsel submitted an e-mail to the Presiding Officer which raised the issue of whether the Presiding Officer could hold proceedings without the presence of the other Commission members. (COL Gunn's e-mail of July 29, 2004 17:37)
 - b. That on 10 August 2004, detailed Defense Counsel sent a memorandum to the Appointing Authority in which he recommended that "the Appointing Authority reject the Presiding Officers (sic) interpretation of his powers and clarify that all sessions of the Military Commission shall be attended by all members of the commission." (LCDR Swift's memorandum of 10 Aug 2004)
 - c. That on 11 August 2004, the Legal Advisor to the Appointing Authority sent a memorandum to the Presiding Officer stating his legal opinion regarding the requirement that all Commission members attend the initial session. (BGEN

Hemingway's memorandum of August 11, 2004, hereinafter "Legal Advisor's memorandum")

4. Legal Authority and Discussion. The Defense alleges that the Legal Advisor's memorandum constitutes unlawful command influence on the part of the Appointing Authority for three reasons. First, the Presiding Officer views the Legal Advisor's memorandum as a directive from the Appointing Authority to have all Commission members present at all sessions in this case. Second, that the Appointing Authority "appears" to have directed his Legal Advisor to send the memorandum in order to exercise his influence over the Presiding Officer by an unauthorized means. Third, the Legal Advisor's memorandum "has fundamentally altered the Presiding Officer's view of his own power, his view of the power of the other commission members, and his view of the relationship between his power and theirs." The Defense asserts that pursuant to Article 37(a), Uniform Code of Military Justice (UCMJ), 10 U.S.C. §837 and military justice case law, the Accused is entitled to dismissal of the proceedings against him, removal of the Appointing Authority, transferal of this case to a substitute Appointing Authority "for determination for (sic) any future action which he or she deems appropriate," and the prohibition of the Legal Advisor to the Appointing Authority from future involvement in any Military Commission proceedings against the Accused.

The Defense's motion should be denied for four reasons. First, the Legal Advisor's memorandum constituted a recitation of existing Commission Law on a subject within the purview of the office the Appointing Authority, and did not direct the Presiding Officer to take any specified action. Second, the Defense fails to produce any evidence that the alleged influence has prejudiced the Accused in any way, or deprived him of a full and fair trial by Military Commission. Third, Article 37(a) is not applicable to Military Commissions. Fourth,

even if Article 37(a) is applicable to Military Commissions, its proscriptions only relate to

influence that occurs during the “adjudicatory” phase of the litigation and not before the trial on the merits begins.

Legal Advisor’s Memorandum In Conformity with Commission Law.

The Appointing Authority is charged with ensuring that military commissions are full and fair and are conducted as efficiently as possible. DoD Directive 5105.70, paragraph 4; and MCO No. 1, paragraph 2 *et. seq.* Moreover, he is specifically charged with addressing interlocutory issues. As such, he is empowered to give instructions to the commission members regarding the interpretation of commission law. Accordingly, opinions issued by him within that authority cannot, by definition, be considered to be unlawful influence.

The Legal Advisor’s memorandum was provided to the Presiding Officer to highlight the Commission Law on whether he could preside over sessions of the Commission without the presence of the other members. BG Hemingway’s preparation of the memorandum was an entirely permissible exercise of oversight by the Office of the Appointing Authority, as mandated by DoD Directive 5105.70. The Legal Advisor’s memorandum was clearly not a directive to the Presiding Officer by any construction, and the Presiding Officer could have decided to hold the first session without the presence of the other Commission members.

No Prejudice to the Accused.

To raise the issue of unlawful command influence, the defense must (1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that unlawful command influence was the cause of the unfairness.

United States v. Biagase, 50 M.J. 143, 150 (C.A.A.F., 1999)(citing United States v. Ayala, 43 M.J. 296 (1995), and United States v. Stombaugh, 40 M.J. 208 (1994)). Prejudice is not presumed until the defense produces evidence of proximate causation between the acts

constituting unlawful command influence and the outcome of the trial. Id.

The Defense has failed to produce any evidence that the Accused has suffered prejudice by the Presiding Officer's decision to hold the initial session of trial with the presence of all Commission members. Indeed the issuance of the Legal Advisor's memorandum, and the Presiding Officer's subsequent mandate that all Commission members be present for the initial session of trial, were precisely what the Detailed Defense Counsel recommended in his memorandum of 10 August 2004. It is now disingenuous for him to complain of prejudice to his client when he has received exactly what he asked for. The Defense is unable to show that the Military Commission proceedings are in any way unfair to the Accused by the presence of all Commission members.

Article 37(a) has no applicability to Military Commissions.

The statutory prohibition alleged by the defense is a violation of Article 37(a), Uniform Code of Military Justice (UCMJ), 10 U.S.C. §837, which states:

No person subject to this chapter may attempt to coerce, or by unauthorized means, influence the action of a *court-martial or any other military tribunal* or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. (emphasis added)

By its terms, Article 37(a) only applies to courts-martial and military tribunals. By contrast, Article 36(a) refers to "cases arising under this chapter triable in courts-martial, *military commissions* and other military tribunals."¹ (emphasis added) Therefore, applying the universally accepted rules of statutory construction, it is clear that while Congress intended the preceding Article 36 would apply to military commissions, while the prohibitions of Article 37 would not. *Expressio unis est exclusio alterius* ("Express mention of one thing implies the exclusion of another").

¹ Article 36, UCMJ permits the President to prescribe procedural rules (included modes of proof and evidentiary rules) for cases arising under the UCMJ. The President's Military Order of November 13, 2001 includes a finding that "consistent with section 836 of title 10, United States Code (i.e. Article 36, UCMJ), that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."

No Influence of the Adjudicatory Phase.

Even if Article 37(a) did apply to Military Commissions, it prohibits influence over trial participants when “reaching the findings or sentence in any case,” and not in procedural matters such as the attendance of participants before a trial on the merits has even begun. In other words, Article 37(a) is designed to protect the “adjudicatory phase” of a court-martial or other military tribunal. See United States v. Bramel, 29 M.J. 958, 967 (ACMR 1990), *aff’d*, 32 M.J. 3 (CMA 1990)(Article 37(a) proscribes unlawful command control over the adjudicative processes of courts-martial and other military tribunals empowered to determine guilt of an offense and to impose punishment for its commission).

The Presiding Officer’s determination of whether the initial session of the Military Commission should be attended by him alone or the full Commission panel does not fall within the “adjudicatory phase” of trial of the Accused. It was merely a preliminary, procedural issue that arose in advance of the initial session of the Commission, long before the Prosecution intends to begin its presentation of evidence on the merits. Assuming *arguendo* that the Appointing Authority intended to influence the Presiding Officer through the Legal Advisor’s memorandum, any influence would have been a legitimate exercise of his lawful authority under DoD Directive 5105.70, as discussed *supra*.

5. Citations to Legal Authority. The Prosecution cites the following legal authority in support of this response:

- a. DoD Directive 5105.70
- b. MCO No. 1
- c. United States v. Biagase, 50 M.J. 143, 150 (C.A.A.F., 1999)
- d. Article 37, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §837
- e. Article 36, UCMJ, 10 U.S.C. §836

f. United States v. Bramel, 29 M.J. 958, 967 (ACMR 1990), aff'd, 32 M.J. 3 (CMA 1990)

6. Resolution of Motion. For the foregoing reasons, the Defense motion should be denied.

7. Evidence in Support. The following evidence is provided in support of this response:

- a. COL Gunn's e-mail of July 29, 2004 17:37
- b. LCDR Swift's memorandum of 10 Aug 2004
- c. BGEN Hemingway's memorandum of August 11, 2004

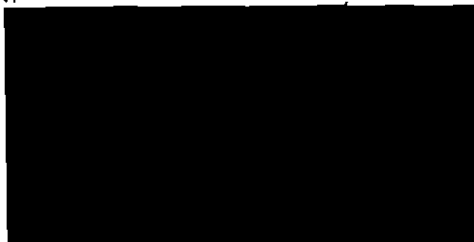
8. Oral Argument. The Prosecution requests oral argument in support of this response.

9. Witnesses. The Prosecution intends to offer an affidavit by BGEN Hemingway in lieu of live testimony.



CERTIFICATE OF SERVICE

I certify that the above Prosecution response was served in person on Defense Counsel for the Accused this 24th day of August 2004.



p. 14 - 1 bkr h
Chad J. J.**CDR, DoD OGC**

From: Gunn, Will, Col, DoD OGC
Sent: Thursday, July 29, 2004 17:37
To: 'Pete Brownback'
Cc: [REDACTED]

Subject: RE: Counsel and the Authority of the Presiding Officer

COL Brownback,

1. I disagree with your interpretation that you have the authority to conduct military commission proceedings without the presence of all commission members. In paragraph 3 of your 28 July 2004 memorandum to me, you state that you have certain powers to act on behalf of the military commission, to include the power to decide pretrial matters and motions and to order counsel to perform certain acts. You conclude by asserting that you "have authority to order those things which I order done." However, it is clear to me that reasonable minds may disagree about the extent of your powers.

2. While your assertion of authority may be consistent with the powers of a judge in an established criminal justice system, those same powers do not necessarily apply to a presiding officer in military commissions established pursuant to the President's Military Order of 13 November 2001. There is a hierarchy of law that applies to military commissions. The President's Military Order, which sits atop that hierarchy, establishes the governing principles for military commissions. The subsequent Military Commission Orders and Instructions that have been issued cannot be inconsistent with the President's Military Order, as recognized by section 6(a) of the President's Military Order and Military Commission Order No. 1 (see paragraph 7B). All powers exercised by a presiding officer must flow from, and not be inconsistent with, the President's Military Order.

3. The President's Military Order requires that orders and regulations issued with respect to military commissions shall provide for "a full and fair trial, with the military commission sitting as the triers of both fact and law." (see Section 4(c)(2)). A plain language interpretation of this provision of the President's Military Order requires that the military commission members, as a whole, decide issues of fact and law. Any provisions inconsistent therewith would be invalid. Although I recognize that some portions of the Military Commission Orders and Instructions may be inconsistent with this provision in the President's Military Order, to the extent that those orders and instructions are inconsistent with the President's Military Order, they are invalid.

4. In his memorandum to the Legal Advisor to the Appointing Authority, dated 28 July 2004, your assistant, Mr. Hodges, states that this provision in the President's Military Order "might be misinterpreted by others in determining the role of the Presiding Officers vis-à-vis the other Commission Members." Mr. Hodges then concedes that an ambiguity between the President's Military Order and the Military Commission Orders and Instructions "may make it unclear which pretrial functions a Presiding Officer may perform without involvement by other Commission Members." Your assistant's concession stands in stark contrast to your assertion of unlimited and unquestioned power. My understanding of the President's Military Order is clear – only the military commission (not the

presiding officer alone) may act as triers of both fact and law. The President has made a determination that there should not be a judge in this process. Furthermore, the President determined that it is "not practicable to apply in military commissions . . . the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." (see Section 1(f)). Although Mr. Hodges may find this to be an inefficient and unwieldy process, it is the one that the President has provided.

5. The views I express here are my own, as Chief Defense Counsel. As such, I leave it to detailed defense counsel to interpret these provisions for themselves and raise whatever objections they determine to be in their clients' best interests. However, as supervisory attorney for all defense counsel involved in military commissions, I recognize certain duties that all counsel have with respect to the military commissions. At a minimum, these duties include those discussed in Rule 3.3 of the Army Rules of Professional Conduct for Lawyers, Rule 3.3 of Navy JAGINST 5803, and Rule 3.3 of the Air Force Rules of Professional Conduct. These provisions all pertain to an attorney's duty of candor toward a tribunal. I am advising defense counsel to uphold their responsibilities under applicable professional responsibility standards.

Col Will A. Gunn
Chief Defense Counsel
Office of Military Commissions

-----Original Message-----

From: Pete Brownback [mailto:]
Sent: Wednesday, July 28, 2004 22:03

Subject: Counsel and the Authority of the Presiding Officer

Memorandum For: COL Gunn, Chief Defense Counsel

28 July 2004

Subject: Counsel and the Authority of the Presiding Officer

1. References:

- a. The President's Military Order of 13 November 2001
- b. DOD Military Commission Order No. 1, 21 March 2002
- c. DOD Dir 5105.70, 10 February 2004
- d. DOD Military Commission Instruction 1, 30 April 2003
- e. DOD Military Commission Instruction 3, 30 April 2003
- f. DOD Military Commission Instruction 4, 30 April 2003
- g. DOD Military Commission Instruction 5, 30 April 2003
- h. DOD Military Commission Instruction 6, 30 April 2003
- i. DOD Military Commission Instruction 7, 30 April 2003
- j. DOD Military Commission Instruction 8, 30 April 2003
- k. DOD Military Commission Instruction 9, 16 December 2003
- l. Memorandum, Mr. Hodges to Legal Advisor to the Appointing Authority,

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Subject: Need for MCO Instructions or Decision, 28 July 2004 (Incl 1)

2. It has come to my attention (e.g., see Incl 2 - Email from LCDR Sandul, 28 Jul 04) that certain counsel may be operating under a misapprehension concerning my authority as the Presiding Officer. Please note that this memorandum does not specifically address any case or any counsel - it covers all four of the cases to which I have been detailed and all of the counsel, whether prosecution or defense, detailed to those cases.

3. So that there is no question of my view in these matters, let me state the following:

- a. I have the authority to set, hear, and decide all pretrial matters.
- b. I have the authority to order counsel to perform certain acts.
- c. I have the authority to set motions dates and trial dates.
- d. I have the authority to act for the Commission without the formal assembly of the whole Commission.

The above listing is not supposed to be all inclusive. Perhaps a better way of looking at the matter is to say that I have authority to order those things which I order done.

4. I base my view upon my reading and interpretation of the references. (I note that my analysis of the references comports with that contained in reference 11.) I recognize that any one person's interpretation of various documents might be wrong. However, in the cases to which I have been appointed as Presiding Officer, my interpretation is the one that counts:

a) until the cases have been resolved and the cases are reviewed, if necessary, by competent reviewing authority (See reference 1k.). At that time, there will be an opportunity for advocates, for either side, to state that the Presiding Officer was wrong in his interpretation of the references or in his actions based upon those interpretations. If so, competent reviewing authority will determine the remedy, if any. Or,

b) until superior competent authority (The President, The Secretary of Defense, The General Counsel of the Department of Defense, The Appointing Authority) issues directives stating that what I am doing is incorrect.

5. No counsel before the Commission is a competent reviewing authority or a superior competent authority. When I issue an order, counsel are encouraged and required, by myself and their oaths, to tell me that they believe I am acting improperly and to provide me the citations and interpretations which support their beliefs. I will consider such reply. I will then make a decision. If my decision is that my prior order will stand, counsel are required to comply with my order.

6. In this regard, I direct your attention to paragraph 4A(5)(b) of reference 1b. As you stated in an email to the Appointing Authority today,

As you are aware, my primary responsibility as Chief Defense Counsel is to provide professional supervision for the personnel assigned to the Office of the Chief Defense Counsel. As we proceed, I believe that it is critical for individuals involved in this process to stay within their areas of responsibility.

disadvantaged, or a counsel lost due to a misunderstanding by counsel of my authority. There is plenty of time on appeal, if necessary, to correct any mistake I might make. Once a counsel's objection to an order is on the record (by memorandum, email, or witnessed conversation - to name but a few methods), the counsel must accept and comply with my order or face sanctions, which no one wishes to have happen.

2 Incl: Peter E. Brownback III
as COL, JA
Presiding Officer

CF:
Appointing Authority
Legal Advisor to the Appointing Authority
Chief Prosecutor
All Counsel

Note to COL Gunn/COL Swann,

If I failed to cc any counsel currently detailed to cases, please insure that this email is forwarded to them.

COL Brownback

MEMORANDUM FOR THE OFFICE OF THE APPOINTING AUTHORITY

FROM: Lieutenant Commander Charles D. Swift, JAGC, USN, Detailed Defense Counsel, *United States v. Hamdan*

SUBJECT: Powers of the Presiding Officer

Purpose: The purpose of this memorandum is to inform the Appointing Authority of Detailed Defense Counsel's objections regarding the Assistant to the Presiding Officer's request to the Appointing Authority on behalf of the Presiding Officer for revision of Military Commission Instruction No. 8 (attached). This memorandum seeks to cognize the Presiding Officer's purported authority to exercise de facto powers of a military judge in contravention of the powers prescribed under Commission rules, historical precedence, and promotion of a full and fair trial. In addition to alerting the Appointing Authority to Detailed Defense Counsel's objections, this memorandum proposes alternative solutions in regards to the commission of Salim Ahmed Hamdan. Objections and recommendations raised in this memorandum are solely that of Detailed Defense Counsel in Military Commission proceedings in conjunction with Salim Ahmed Hamdan and do not represent the position of the Chief Defense Counsel or the Defense teams, military or civilian, in any other Commission.

Issue: Under the President's Military Order, subsequent military orders and instructions, and legal precedent, do Military Commission proceedings conducted outside the presence of the other commission members constitute a lawfully constituted tribunal, when the proceedings are conducted by the Presiding Officer for the purpose of resolving legal motions, witness and evidentiary issues?

Discussion: The Presiding Officer's proposed actions contrast with the President's Military Order of November 13, 2001, dictating that the Military Commission provide "a full and fair trial with the Military Commission sitting as triers of both law and fact," and Military Commission Order No. 1, Section 4.A.1, that states "members shall attend all sessions of the Commission." The Presiding Officer's power under MCO No. 1 is administrative rather than substantive (e.g. limited to the preliminary admission of evidence, subject to review of panel members, maintaining the discipline of proceedings, ensuring qualifications of attorneys, scheduling, certifying interlocutory questions¹, determining the availability of witnesses, etc.) See sections 4.A, 5.H, 6.A.5, and 6.D.1, 6.D.5. Nothing in the powers set out in either the President's Military Order or the MCO No. 1 suggest that the Presiding Officer's powers extend to that of a military judge, capable of holding independent sessions.

¹ The requirement under Section 4.A.(5)(d) of MCO 1, that the Presiding officer certify all dispositive motions to the Appointing Authority conflicts with the plain language of the Presidential order that the Commission be the "triers of law and fact" and is likely invalid under section 7.B. of MCO 1.

In creating the present Military Commissions the government has relied on the legal and historical principles set out *in re Quirin*. The Quirin Commission, however, was conducted for all sessions with the Military Commissions as a whole, hearing all questions of law and fact. These included questions of the Commissions including questions of whether counsel had the right to preemptory challenge, jurisdiction, lawfulness of the Presidential order, and lawfulness of the charges. (See pages 15-18, 23-39, and 46-60 of Transcript of Preceedings Before the Military Commissions to Try Persons Charged with Offenses against the Law of War and the Articles of War, Washington, D.C., July 8 to July 31, 1942, University of Minnesota, 2004, Editors, Joel Samaha, Sam Root, and Paul Sexton). Indeed the Detailed Defense Counsel has been able to find no previous Military Commission that was conducted in the manner proposed by the Presiding Officer.

The conduct of Military Commission sessions outside the presence of all members does not comport with the overriding objective that the Commission provide a full and fair trial. By acting as a *de facto* military judge in these preceedings, the Presiding Officer runs a high risk in prejudicing the panel as a whole. In essence what the Presiding Officer proposes is that he alone will make determinations regarding legal motions, such as but not limited to the legality of the Commission, the elements of the charges, issues of voluntariness of confessions, relevance of witnesses and those facts that are not subject to contention. In order to make these determinations the Presiding Officer will necessarily have to make findings of fact in addition to determining the law. By assuming the role of an independent fact finder and law giver, the Presiding Officer elevates his status relative to the other members to a point that it cannot be reasonably expected that his opinions will not be given undue weight by the other members during deliberations. It cannot be reasonably expected that after the Presiding Officer has independently heard evidence, determined the law, and conducted a portion of the preceedings outside the presence of the other members that they will not subsequently defer to his judgment during deliberations. Such a system is not in keeping with the requirement that the preceedings be full and fair. For the process to be full and fair, each member must have an equal voice. The Presiding Officer, however, in the name of expediency proposes to make himself first among equals.

Even if the Appointing Authority agrees with the Presiding Officer's position regarding alteration of MCI No. 8, Detailed Defense Counsel objects to any alterations to military instructions without the concurrence of Mr. Hamdan and his Defense Counsel as an *expos facto* alteration of the procedures for trial after charges have been referred to Commission in violation *Calder v. Bole* 3 Dall. 386 (1798)

Detailed Defense Counsel is not unmindful of the difficulties associated with the use of members to make all of these determinations. The Presiding Officer's assistant in his *ex parte* memorandum to the Legal Advisor to the Appointing Authority, points out that the use of members to make determinations on all issues substantially mirrors the court-martial process prior to the institution of the Uniform Code of Military Justice. Although this process was abandoned with the advent of the Uniform Code of Military Justice for Courts-martial, there is no authority for abandoning it with respect to Military

Commissions. Nothing in the President's order indicated that he tended to deviate from the past process; rather the portion of the President's Military Order of November 13, 2001, dealing with Military Commissions, is an almost word for word that of President Roosevelt's orders regarding the Quirin Commission.

The Assistant's memo justifies the departure from historical precedent on the grounds that requiring line officers to vote on complex issues few lawyers can articulate jeopardizes efficient trials and potentially prejudices the proceedings. Detailed Defense Counsel agrees that line officers will be confronted with extremely complex issues, but does not agree that the solution lies in granting judicial powers to the Presiding Officer in a hearing that is distinctly separate from a courts-martial or federal trial. A condition expressly recognized by the procedures employed by Quirin Commission and to deviate from those recognized procedures now results in a procedure that is not even consistent with the historic one.

Recommendation: Detailed Defense Counsel proposes in the alternative that recent procedures used in international tribunals for war crimes provide the solution. In both the former Yugoslavia and Rwandan tribunals, the war crimes tribunals have been composed of international judges. Detailed Defense counsel recommends that the Appointing Authority reject the Presiding Officers interpretation of his powers and clarify that all sessions of the Military Commission shall be attended by all members of the commission. Further, Defense Counsel recommends that the Appointing Authority relieve the line officers appointed to serve as members of the commission and appoint in the alternative active or reserve Judge Advocates who are qualified to serve as military judges. Appointment of a panel of judge advocates does not require a change in the Military Commission rules as there is no requirement that a commission member be anything beyond a commissioned officer. Appointment of judge advocates to the commissions will permit careful consideration of the legal issues, expedite necessary legal research into these issues, avoid prejudice created by ex parte proceedings, and mirror international process.

LCDR Charles D. Swift, JAGC, USN
Detailed Defense Counsel
Office of Military Commissions

Cc:
Chief Defense Counsel
Chief Prosecutor
Presiding Officer
CDR [REDACTED] Detailed Prosecutor in *U.S. v. Hamdan*
Legal Advisor to the Appointing Authority
Legal Advisor to the Presiding Officer

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**DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600**



August 11, 2004

MEMORANDUM FOR Presiding Officer, Colonel Peter Brownback

SUBJECT: Presence of Members and Alternate Members at Military Commission Sessions

The Orders and Instructions applicable to trials by Military Commission require the presence of all members and alternate members at all sessions/proceedings of Military Commissions.

The President's Military Order (PMO) of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," requires a full and fair trial, with the military commission sitting as the triers of both fact and law. *See Section 4(c)(2)*. The PMO identifies only one instance in which the Presiding Officer may act on an issue of law or fact on his own. Then, it is only with the members present that he may so act and the members may overrule the Presiding Officer's opinion by a majority of the Commission. *See Section 4(c)(3)*.

Further, Military Commission Order (MCO) No. 1 requires the presence of all members and alternate members at all sessions/proceedings of Military Commissions. Though MCO No. 1 delineates duties for the Presiding Officer in addition to those of other Commission Members, it does not contemplate convening a session of a Military Commission without all of the members present.

The "Commission" is a body, not a proceeding, in and of itself. Each Military Commission, comprised of members, collectively has jurisdiction over violations of the laws of war and all other offenses triable by military commission. The following authority is applicable.

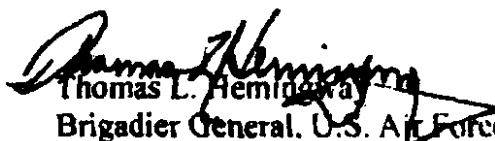
- MCO No. 1, Section 4(A)(1) directs that the Appointing Authority shall appoint the members and the alternate member or members of each Commission. As such, the appointed members and alternate members collectively make up each "Commission."
- MCO No. 1, Section 4(A)(1) also requires that the alternate member or members shall attend all sessions of the Commission. This requirement for alternate



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members to attend all sessions assumes that members are required to attend all sessions of the Commission, as well.

- MCO No. 1, Section 4(A)(4) directs the Appointing Authority to designate a Presiding Officer from among the members of each Commission. This is further evidence that the Commission was intended to operate as an entity including all of the members.
- MCO No. 1, Section 4(A)(4) also states that the Presiding Officer will preside over the proceedings of the Commission from which he or she was appointed. Implicit in this statement is the understanding that there are no proceedings without the Commission composed of and operating with all of its members. The Presiding Officer is only one of the appointed members to the Commission, who in addition, presides over the proceedings of the Commission.



Thomas L. Heminger
Brigadier General, U.S. Air Force
Legal Advisor to the Appointing Authority
for Military Commissions

cc: Chief Defense Counsel
Chief Prosecutor

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

)
) DEFENSE MOTION:
) FOR DISMISSAL OF
) CHARGES FOR FAILURE TO
) ACCORD THE ACCUSED A
) STATUS REVIEW HEARING
) BEFORE MILITARY COMMISSION
)
)
)
) August 24, 2004

1. Timeliness. This motion is filed in a timely manner as the material facts could not be known to the Defense prior to the date for commencement of proceedings in the Military Commission of Salim Ahmed Hamdan. Specifically the Defense could not ascertain prior to the date of commencement of proceedings whether the government had provided Mr. Hamdan a Combatant Status Review Tribunal.

2. Relief Sought. The Defense requests that the Military Commission dismiss the charges against Mr. Hamdan as untimely or in the alternative abate proceedings pending the outcome of Mr. Hamdan's Status Review Tribunal.

3. Overview. The United States government has stated in federal litigation that Mr. Hamdan is entitled to and will receive a Combatant Status Hearing regarding his detention in Guantanamo Bay prior to the commencement of a Military Commission in his case. The purpose of this Tribunal is to determine Mr. Hamdan's status, that is, whether he is a combatant at all, if a combatant, whether he is a POW and finally to determine whether his continued detention is justified.

4. Facts

a. On 7 July 2004, the Secretary of the Navy's Order Establishing Combatant Status Review Tribunal of July 7, 2004 (Press statement by Secretary of the Navy).

b. On or about 13 July 2004, Mr. Hamdan was served with a notice of his rights regarding the Combatant Status Review Hearing. (Mr. Hamdan statements to Defense Counsel and Defense Paralegal, copy of English version attached).

c. On 13 July 2004, a charge of conspiracy against Mr. Hamdan was approved and referred to this Military Commission by the Appointing Authority. (Charges previously furnished to Commission).

d. On 13 July 2004, Detailed Defense Counsel requested that charges be served on his office vice Mr. Hamdan and indicated that Detailed Defense Counsel would provide Mr. Hamdan with the Arabic copy of the charges during his next visit to Guantanamo Bay. (Memorandum from Defense Counsel).

Review Exhibit

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Page

1

Of

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e. On 13 July 2004, a copy of charges was provided to Detailed Defense Counsel's paralegal via email. (Prosecution email of 13 July).

f. On 4 August 2004, Detailed Defense Counsel served on Mr. Hamdan the Arabic translation of charges provided by the Prosecution.

g. On 5 August 2004, Detailed Defense Counsel spoke with the lead Prosecutor in the case via telephone in an effort to ensure that he had the correct copy of charges.

h. On 6 August 2004, the United States government filed a notice of motion supported by memorandum, in *Swift v. Rumsfeld* and specifically promised to Mr. Hamdan that prior to trial by Military Commission he would be accorded a Combatant Status Review Hearing. (United States memorandum in support of its cross-motion to dismiss in *Swift v. Rumsfeld* in United States District Court, Western District of Washington at Seattle, at page 12).

i. As of the date of this motion the government has not provided the Combatant Status Review Tribunal for Mr. Hamdan as promised. (Statements of Mr. Hamdan to Defense Counsel).

5. Law Supporting the Request for the Relief Sought

The question before the Commission is whether the government, after instituting regulations for a Combatant Status Review Hearing and promising a Federal District Court that Mr. Hamdan would receive such a hearing prior to the commencement of trial before a Military Commission, may lawfully disregard their regulations and promises and proceed to trial before Military Commission in the absence of a Combatant Status Review Hearing.

The government's obligation to abide by its own regulations was clearly established by the United States Supreme Court in *Service v. Dulles* 354 U.S. 363 (1957) and *Vitarelli v. Seaton* 359 U.S. 535 (1959). Both of these cases involve questions of whether the Secretary of State was able to discharge an employee after he had commenced security hearings regarding the employee. In each case the court held that irrespective of whether the employee had a right to the hearing that the Secretary was bound to comply with the regulations for a hearing once those regulations had been implemented as Justice Harlan wrote in *Vitarelli*, "having chosen to proceed against petitioner on security grounds, the Secretary here, as in *Service*, was bound by the regulation which he himself had promulgated for dealing with such cases, even though without such regulations he could have discharged petitioner summarily." *Id* at 539-40. In so finding the Court did not address whether Mr. Vitarelli had an independent constitutional right but rather based its findings on limits the agency had imposed on itself. The Courts holdings did not depend on finding of rights in the affected individual, but in imposing limits on the agency -- limits derived from the rules the agency itself had adopted.

The Supreme Courts earlier holding in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), makes clear that the government is similarly limited when dealing with aliens. In *Accardi*, the plaintiff was an alien who complained that he had been denied a fair hearing before the Board of Immigration Appeals by virtue of the Attorney General having placed him on a list

of "unsavory characters." The Court held that although the statute concerning suspension of deportation granted the Attorney General the absolute discretion to grant or deny suspensions, he could not prejudice the procedure he had established by creating the Board of Immigration Appeals by sending to it, a list of "unsavory characters" that he wanted to deport.

The government now seeks to do substantially the same in Mr. Hamdan's case. By commencing Military Commission proceedings against Mr. Hamdan, the government necessarily prejudices the Combatant Status Review Hearings. Inherent to prosecution of Mr. Hamdan before Military Commissions is the government contentions that not only is Mr. Hamdan a combatant, but that his actions rise to the level of war crimes prosecutable by Military Commission and punishable by up to life in prison. In order to maintain any chance of a fair hearing Mr. Hamdan must enter a plea of not guilty and undergo criminal jeopardy prior to being afforded the opportunity to have his status as a combatant reviewed. Such a contention at least rises to the same level as to include him on a list of unsavory characters. In order to afford Mr. Hamdan the same opportunity as other detainees brought before the Combatant Status Review Hearings, to dismiss the charges against Mr. Hamdan pending the outcome of this hearing.

Indeed a Combatant Status Review Hearing is necessary at the onset in order to determine at a minimum what category Mr. Hamdan fall into and as such what rights are accorded him under U.S. and international law. That is whether Mr. Hamdan should be classified a POW, a civilian, or an unauthorized belligerent. The Geneva Conventions, other international treaties and domestic statute, create separate and distinct obligations for the treatment and trial of persons in each of these categories. Until a determination of Mr. Hamdan's status is made, this Commission will be unable to determine the rights and procedure to be accorded Mr. Hamdan.

6. Documents Attached in Support of this Motion

Press statement by Secretary of the Navy

Memorandum from Defense Counsel

Prosecution email of 13 July

United States memorandum in support of its cross-motion to dismiss in *Swift v. Rumsfeld* in United States District Court, Western District of Washington at Seattle, at page 12

Notice of Combatant Status Hearing

7. Oral Argument. Is requested in order to reply to the government's response.

8. Legal Authority. The following legal authority has been cited in support of this motion:

Service v. Dulles 354 U.S. 363 (1957)

Vitarelli v. Seaton 359 U.S. 535 (1959)

United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954)

9. Witnesses/Evidence. Witnesses, Mr. Hamdan is available to testify for the limited purpose of determining the date on which he was served notice of Combatant Status Review Hearing, charges before a Military Commission, and whether he has in fact received a Combatant Status Review Hearing.

Review Exhibit 13

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10. Additional Information. None.



CHARLES D. SWIFT

Lieutenant Commander, JAGC, U.S. Navy

Detailed Defense Counsel

Office of Military Commissions

Attachments:

As stated



Aug. 21, 2004

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United States Department of Defense

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No. 651-04
July 7, 2004

IMMEDIATE RELEASE

COMBATANT STATUS REVIEW TRIBUNAL ORDER ISSUED

The Department of Defense announced today the formation of the Combatant Status Review Tribunal for detainees held at Guantanamo Bay, Cuba. This tribunal will serve as a forum for detainees to contest their status as enemy combatants.

Detainees held at Guantanamo Bay will be notified within 10 days of their opportunity to contest their enemy combatant status under this process. The tribunal process will start as soon as possible. Detainees will also be notified of their right to seek a writ of habeas corpus in the courts of the United States. Habeas corpus is a writ ordering a person in custody to be brought before a court.

An individual tribunal will be comprised of three neutral officers, none of whom were involved with the detainee. One of the tribunal members will be a judge advocate and the senior ranking officer will serve as the president of the tribunal.

Each detainee will be assigned a military officer as a personal representative. That officer will assist the detainee in preparing for a tribunal hearing. Detainees will have the right to testify before the tribunal, call witnesses and introduce any other evidence. Following the hearing of testimony and other evidence, the tribunal will determine in a closed-door session whether the detainee is properly held as an enemy combatant. Any detainee who is determined not to be an enemy combatant will be transferred to their country of citizenship or other disposition consistent with domestic and international obligations and U.S. foreign policy.

This tribunal does not replace the administrative review procedure announced earlier this year.

The order establishing the tribunals and a DoD Fact Sheet are available at:
<http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>
<http://www.defenselink.mil/news/Jul2004/d20040707factsheet.pdf>

RE 13

13 July 2004

From: Detailed Defense Counsel
To: Appointing Authority, Office of the Military Commissions

Subj: SERVICE OF CHARGES ICO SALEM AHMED HAMDAN

1. Pursuant to the approval and referral of charges in US v. Salim Ahmed Hamdan, I request that charges not be served upon Mr. Hamdan until I am able to be present to explain the allegations of wrongs to my client in a timely fashion. I am presently in Yemen on Temporary Duty orders and will be out of the Continental United States until 29 July 2004. The earliest I am able to travel to Naval Station Guantanamo Bay, Cuba to be present for the service of charges Mr. Hamdan is 3 August 2004. In the alternative, I request that charges be served on my office vice Mr. Hamdan.

2. If you require any further information in support of this request, I maybe contacted in Yemen at 011-967-73234852. Alternatively, my paralegal may be contacted at 703-607-1521 ext. 196 and he can forward a message to me.

C. D. SWIFT
LCDR, JAGC, USN
Detailed Defense Counsel

CC:
Chief Defense Counsel
JTF GITMO SJA

1 that "[i]n February of 1998, Usama Bin Laden, Ayman al Zawahiri and others under the
2 banner of the 'International Islamic Front for Jihad on the Jews and Crusaders,' issued a fatwa
3 (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether
4 civilian or military – anywhere they can be found and to 'plunder their money.'" Id. ¶ 9. It
5 further alleges that "[s]ince 1989, members and associates of al Qaida * * * have carried out
6 numerous terrorist attacks, including, but not limited to: the attacks against the American
7 Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in
8 October 2000; and the attacks on the United States on September 11, 2001." Id. ¶ 11.

9 As for Hamdan's role in the conspiracy, the charge asserts that "[i]n 1996, Hamdan
10 met with Usama bin Laden in Qandahar, Afghanistan, and ultimately became a bodyguard and
11 personal driver for Usama bin Laden," serving in that capacity "until his capture in November
12 of 2001." Id. ¶ 13(a). The charge further alleges that, in furtherance of al Qaida's objectives,
13 Hamdan from 1996 through 2001 "delivered weapons, ammunition or other supplies to al
14 Qaida members and associates," id. ¶ 13(a); "picked up weapons at Taliban warehouses for
15 al Qaida use and delivered them directly to Saif al Adel, the head of al Qaida's security
16 committee, in Qandahar, Afghanistan," id. ¶ 13(b)(1); "purchased or ensured that Toyota
17 Hi Lux trucks were available for use by the Usama bin Laden bodyguard unit tasked with
18 protecting and providing physical security" for bin Laden, id. ¶ 13(b)(2); "served as a driver
19 in a convoy of three to nine vehicles in which Usama bin Laden and others were transported
20 to various areas in Afghanistan" at the time of the 1998 embassy attacks and the September 11
21 attacks, id. ¶ 13(b)(4); "drove or accompanied Usama bin Laden to various al Qaida-
22 sponsored training camps, press conferences, or lectures," id. ¶ 13(c); and "received training
23 on rifles, handguns and machine guns at the al Qaida-sponsored al Farouq camp in
24 Afghanistan," id. ¶ 13(d).

25 The Appointing Authority approved and referred the charge to a Military Commission
26 on July 13, 2004. See Exhibit B. The charge is noncapital, so Hamdan faces a maximum
27 sentence of life imprisonment. Both the government and Hamdan have proposed that his
28

NOTICE OF MOTION AND RESPONDENTS' CROSS-MOTION TO DISMISS;
CONSOLIDATED RETURN TO PETITION AND MEMORANDUM OF LAW
IN SUPPORT OF CROSS-MOTION TO DISMISS - 12

1 Commission trial begin in December. Hamdan is scheduled to appear before the Commission
2 on August 23, 2004, for preliminary matters.⁶

3 ARGUMENT

4 Since the founding of this nation, the military has used military commissions during
5 wartime to try violations against the laws of war. Nearly ninety years ago, Congress
6 recognized this historic practice and approved its continuing use. And nearly sixty years ago,
7 the Supreme Court upheld the use of military commissions during World War II against a
8 series of challenges, including cases involving a presumed American citizen, captured in the
9 United States, Ex parte Quirin, 317 U.S. 1 (1942); the Japanese military governor of the
10 Phillippines, Yamashita v. Styer, 327 U.S. 1 (1946); German nationals who alleged that they
11 worked for civilian agencies of the German government in China, Johnson v. Eisentrager,
12 339 U.S. 763 (1950); and the spouse of a serviceman posted in occupied Germany, Madsen v.
13 Kinsella, 343 U.S. 341 (1952). Despite the fact that both Congress and the Judiciary have
14 blessed the Executive's use of military commissions during wartime, despite the fact that the
15 statutory framework today is identical in all material respects to that which existed during the
16 prior legal challenges, and despite the fact that the President has inherent power as
17 Commander in Chief to establish military commissions in the war against al Qaida and the
18 Taliban, petitioner contends that Hamdan's detention pursuant to the Military Order violates
19 federal statutes, the Constitution, and the Geneva Conventions. As discussed in more detail
20 below, these claims cannot be heard at this time and lack merit in any event.⁷

21
22 ⁶ Before his trial, Hamdan will have the opportunity to challenge his status as an enemy
23 combatant before a Combatant Status Review Tribunal. See July 7, 2004 Order Establishing
24 Combatant Status Review Tribunal, available at
25 www.defenselink.mil/news/Jul/2004/d20040707review.pdf. That Tribunal will only confirm
whether Hamdan is properly classified as an enemy combatant, not whether he committed the
offense approved and referred for trial by the Military Commission.

26 ⁷ These claims cannot be heard for the additional reasons that petitioner lacks standing to
27 serve as Hamdan's next-friend or as a third party, this Court lacks habeas jurisdiction, a
28 mandamus petition is not appropriate given the nature of petitioner's claims, and this Court is
not a proper venue even if mandamus were a proper vehicle. See Respondents' Motion to
Dismiss or Transfer dated July 16, 2004.

Combatant Status Review Tribunal Notice to Detainees*

You are being held as an enemy combatant by the United States Armed Forces. An enemy combatant is an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. The definition includes any person who has committed a belligerent act or has directly supported such hostilities.

The U.S. Government will give you an opportunity to contest your status as an enemy combatant. Your case will go before a Combatant Status Review Tribunal, composed of military officers. This is not a criminal trial and the Tribunal will not punish you, but will determine whether you are properly held. The Tribunal will provide you with the following process:

1. You will be assigned a military officer to assist you with the presentation of your case to the Tribunal. This officer will be known as your Personal Representative. Your Personal Representative will review information that may be relevant to a determination of your status. Your Personal Representative will be able to discuss that information with you, except for classified information.
2. Before the Tribunal proceeding, you will be given a written statement of the unclassified factual basis for your classification as an enemy combatant.
3. You will be allowed to attend all Tribunal proceedings, except for proceedings involving deliberation and voting by the members, and testimony or other matters that would compromise U.S. national security if you attended. You will not be forced to attend, but if you choose not to attend, the Tribunal will be held in your absence. Your Personal Representative will attend in either case.
4. You will be provided with an interpreter during the Tribunal hearing if necessary.
5. You will be able to present evidence to the Tribunal, including the testimony of witnesses. If those witnesses you propose are not reasonably available, their written testimony may be sought. You may also present written statements and other documents. You may testify before the Tribunal but will not be compelled to testify or answer questions.

As a matter separate from these Tribunals, United States courts have jurisdiction to consider petitions brought by enemy combatants held at this facility that challenge the legality of their detention. You will be notified in the near future what procedures are available should you seek to challenge your detention in U.S. courts. Whether or not you decide to do so, the Combatant Status Review Tribunal will still review your status as an enemy combatant.

If you have any questions about this notice, your Personal Representative will be able to answer them.

[*Text of Notice translated, and delivered to detainees 12-14 July 2004]

Enclosure (4)

RE 13

354 U.S. 363, *; 77 S. Ct. 1152, **;
1 L. Ed. 2d 1403, ***; 1957 U.S. LEXIS 658

SERVICE v. DULLES ET AL.

No. 407

SUPREME COURT OF THE UNITED STATES

354 U.S. 363; 77 S. Ct. 1152; 1 L. Ed. 2d 1403; 1957 U.S. LEXIS 658

April 2-3, 1957, Argued
June 17, 1957, Decided

PRIOR HISTORY:

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

DISPOSITION: 98 U. S. App. D. C. 268, 235 F.2d 215, reversed and remanded.

CASE SUMMARY


PROCEDURAL POSTURE: Petitioner sought review of a decision of the United States Court of Appeals for the District of Columbia Circuit, which affirmed petitioner's discharge from his employment as a Foreign Service Officer in the Foreign Service of the United States.


OVERVIEW: The Supreme Court reversed the appeals court's judgment affirming petitioner's discharge from his employment as a Foreign Service Officer in the Foreign Service of the United States, because the Secretary of State failed to comply with U.S. Dept. of State, Manual of Regulations and Procedures § 393.1 (1951). Petitioner argued that U.S. Dept. of State, Manual of Regulations and Procedures, § 390 et seq. (1949) remained applicable to his case, since he was not advised of the existence of the 1951 Regulations. The Supreme Court stated that it was unnecessary to make a choice between the two sets of regulations, finding that the manner in which petitioner was discharged was inconsistent with both. The necessary effect of that U.S. Dept. of State, Manual of Regulations and Procedures § 393.1 of the 1951 Regulations was to subject the exercise of the Secretary's McCarran Rider authority under 65 Stat. 581 to the substantive standards prescribed by that section and also to the procedural requirements that such cases were to be decided on all the evidence and after consideration of the complete file, arguments, briefs, and testimony presented.

OUTCOME: The Supreme Court reversed the judgment of the court below.

CORE TERMS: regulations, rider, loyalty, reasonable doubt, advisable, Public Law, security risk, terminate, favorable, disloyal, duty, post-audit, promulgated, unfavorable, discharged, removal, absolute discretion, recommendation, departmental, termination, terminated, effective, effected, handling, binding, invalid, national security, alien, notify, deem

LexisNexis(R) Headnotes ♦ Hide Headnotes


Governments > State & Territorial Governments > Employees & Officials 


HN1  The following procedural scheme has been established by U.S. Dept. of State, Manual of Regulations and Procedures § 390 et seq. (1949) relating to loyalty and security cases: The filing of charges, upon notice to the employee involved, accompanied by adequate factual details as to their basis, and a statement as to the employee's work and pay status pending further action; and a hearing on such charges, if requested by the employee, before the Department's Loyalty Security Board, whose determination, together with the record of the hearings, were then to be


Review Exhibits 1-15


RE 13

forwarded to the Deputy Under Secretary for review. Upon such review, the Deputy Under Secretary was empowered (i) to return the case to the Board for further investigation or action; (ii) to decide in favor of the employee, and to so notify him in writing; or (iii) to decide against the employee, and to notify him of his right to appeal to the Secretary of State within 10 days thereafter. [More Like This Headnote](#)

Governments > Federal Government > Employees & Officials 

HN2  In the event of an appeal of a loyalty and security case under U.S. Dept. of State, Manual of Regulations and Procedures § 390 et seq. (1949), the Secretary of State is empowered (i) to decide favorably to the employee, and to so notify him in writing; or (ii) to decide against the employee, and to notify him of such decision, and further, in a loyalty case, of his right to appeal to the Loyalty Review Board within 20 days thereafter. If, upon such an appeal, the Loyalty Review Board decides adversely to the employee and makes an "advisory" recommendation to the Secretary that the employee should be removed from employment under the applicable loyalty standards, the Department is to take prompt administrative action to that end. On the other hand if the Board decides favorably to the employee the Secretary is empowered (i) to restore the employee to duty and "close the case"; (ii) to permit the employee to resign; or (iii) to terminate his employment under the authority conferred by the McCarran Rider "or other appropriate authority." [More Like This Headnote](#)


Governments > Federal Government > Employees & Officials 

HN3  Under U.S. Dept. of State, Manual of Regulations and Procedures § 390 et seq. (1949), following a decision of the Deputy Under Secretary upon a determination of Department Loyalty Security Board, there is an appeal to Secretary only if Deputy's action is adverse to employee. Under the Regulations the action of Deputy Under Secretary, if favorable to employee, is final, the Secretary reserving to himself power to act further only if his Deputy's action is unfavorable to employee. There is likewise an appeal to Loyalty Review Board from Secretary's decision only if his action is adverse to the employee. A decision of the Secretary favorable to the employee is final, and immune from further action by the Loyalty Review Board on post-audit. The Secretary reserves right to deal with such a case under his McCarran Rider authority (65 Stat. 581), outside Regulations, only in instances where, upon employee's appeal to the Loyalty Review Board from an unfavorable decision by the Secretary, the decision of that body is favorable to the employee. [More Like This Headnote](#)

Governments > Federal Government > Employees & Officials 

HN4  See U.S. Dept. of State, Manual of Regulations and Procedures § 393.1 (1951).

Governments > Federal Government > Employees & Officials 

HN5  Since U.S. Dept. of State, Manual of Regulations and Procedures § 391.1 (1951), which is incorporated by reference into U.S. Dept. of State, Manual of Regulations and Procedures § 393.1, specifically subjects the exercise of the Secretary's McCarran Rider authority (65 Stat. 481) to the operation of the 1951 Regulations, it seems clear that the necessary effect of U.S. Dept. of State, Manual of Regulations and Procedures § 393.1 is to subject the exercise of that authority to the substantive standards prescribed by that section, namely, those established by the Act of August 26, 1950, and also to the procedural requirements that such cases must be decided "on all the evidence" and after consideration of the complete file, arguments, briefs, and testimony presented. The essential meaning of the section, in other words, is that the Secretary's decision is required to be on the merits. While it is true that under the McCarran Rider the Secretary is not obligated to impose upon himself these more rigorous substantive and procedural standards, neither is he prohibited from doing so, and having done so he can not, so long as the Regulations remain unchanged, proceed without regard to them. [More Like This Headnote](#)

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SYLLABUS: This suit was brought by petitioner, a Foreign Service Officer, to test the validity of his discharge by the Secretary of State under these circumstances: The State Department's Loyalty Security Board had repeatedly cleared petitioner of charges of being disloyal and a security risk; and its findings had been Review Exhibits 1-15

approved by the Deputy Under Secretary, whose approval of findings *favorable* to an employee were final under the applicable Regulations. No finding *unfavorable* to petitioner ever had been made by the Department's Loyalty Security Board or the Deputy Under Secretary, and no recommendation *unfavorable* to petitioner ever had been made by the Deputy Under Secretary to the Secretary. Nevertheless, the Loyalty Review Board of the Civil Service Commission, on its own motion, conducted its own hearing, found that there was reasonable doubt as to petitioner's loyalty, and advised the Secretary that petitioner "should be forthwith removed from the rolls of the Department of State." Acting solely on the basis of the finding of that Board, and without making any independent determination of his own on the record in the case, the Secretary discharged petitioner on the same day. He based this action on Executive Orders No. 9835 and No. 10241 and § 103 of Public Law 188, 82d Congress, commonly known as the McCarran Rider, which authorized the Secretary, "in his absolute discretion," to "terminate the employment of any officer . . . of the Foreign Service . . . whenever he shall deem such termination necessary or advisable in the interests of the United States." *Held*: Petitioner's discharge was invalid, because it violated Regulations of the Department of State which were binding on the Secretary; and the judgment is reversed. Pp. 365-389.

1. The Regulations of the State Department governing this subject were applicable to discharges under the McCarran Rider, as well as to those effected under the Loyalty-Security Program. Pp. 373-381.

(a) The terms of the Regulations, the fact that the Department itself proceeded in this very case under those Regulations down to the point of petitioner's discharge, representations made by the State Department to Congress relating to its practices under the McCarran Rider, and the announced wish of the President to the effect that authority under the McCarran Rider should be exercised subject to procedural safeguards designed to protect "the personal liberties of employees," all combine to support this conclusion. Pp. 373-379.

(b) The Secretary was not powerless to bind himself by these Regulations as to discharges under the McCarran Rider. Pp. 379-380.

(c) A different result is not required by the fact that the Regulations refer explicitly to discharges based on loyalty and security grounds and make no reference to discharges deemed "necessary or advisable in the interests of the United States," which is the sole standard of the McCarran Rider. Pp. 380-381.

2. The manner in which petitioner was discharged was inconsistent with, and violative of, Regulations of the State Department -- regardless of whether the 1949 Regulations or the 1951 Regulations be considered applicable. Pp. 382-388.

(a) Under the 1949 Regulations, the Secretary had no right to dismiss petitioner for loyalty or security reasons unless and until the Deputy Under Secretary, acting upon findings of the Department's Loyalty Security Board, had recommended dismissal. Pp. 383-387.

(b) Under § 393.1 of the 1951 Regulations, a decision in such a case could be reached only "after consideration of the complete file, arguments, briefs, and testimony presented," and the record shows that the Secretary made no attempt to comply with this requirement in this case. Pp. 387-388.

3. Since the Secretary did not comply with the applicable Regulations of his Department, which were binding on him, petitioner's dismissal cannot stand. *Accardi v. Shaughnessy*, 347 U.S. 260. Pp. 388-389.

COUNSEL: C. Edward Rhett argued the cause for petitioner. With him on the brief were Warner W. Gardner and Alfred L. Scanlan.

Donald B. MacGuineas argued the cause for respondents. With him on the brief were Solicitor General Rankin, Assistant Attorney General Doub and Paul A. Sweeney.

JUDGES: Warren, Black, Frankfurter, Douglas, Burton, Harlan, Brennan, Whittaker; Clark took no part in the consideration or decision of this case.

OPINIONBY: HARLAN

OPINION: [*365] [***1406] [**1153] MR. JUSTICE HARLAN delivered the opinion of the Court.

Review Exhibits 1-15

Aug. 24, 2004 Session

http://www.lexis.com/research/retrieve?_m=037733aef946122da9dd7d6049d5a94c&csvc=le&cform=&_f... 8/20/2004

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RE 13

On December 14, 1951, petitioner John S. Service, was discharged by then Secretary of State, Dean Acheson, from his employment as a Foreign Service Officer in the Foreign Service of the United States. This case brings before us the validity of that discharge.

At the time of his discharge in 1951, Service had been a Foreign Service Officer for some sixteen years, during ten of which, 1935-1945, he had served in various capacities in China. In April 1945, shortly after his return to this country, Service became involved in the so-called Amerasia investigation through having furnished to one Jaffe, the editor of the Amerasia magazine, copies of certain of his Foreign Service reports. Two months later, Service, Jaffe and others were arrested and charged with violating the Espionage Act, n1 but the grand jury, in August 1945, refused to indict Service. He was thereupon restored to active duty in the Foreign Service, from which he had been on leave of absence since his arrest, and returned to duty in the Far East.

----- Footnotes -----

n1 Act of June 15, 1917, c. 30, 40 Stat. 217, as amended.

----- End Footnotes -----

From then on Service's loyalty and standing as a security risk were under recurrent investigation and review by a number of governmental agencies under the provisions of Executive Order No. 9835, n2 establishing the President's Loyalty Program, and otherwise. He was accorded successive "clearances" by the **[**1154]** State Department **[*366]** in each of the years 1945, 1946 and 1947, n3 and a fourth clearance in 1949 by that Department's Loyalty Security Board, which, however, was directed by the Loyalty Review Board of the Civil Service Commission, when the case was examined by it on "post-audit," n4 to prefer charges against Service and conduct a hearing thereon. This was done, and on October 6, 1950, after extensive hearings, the Department Board concluded that "reasonable grounds do not **[***1407]** exist for belief that . . . Service is disloyal to the Government of the United States . . .," and that ". . . he does not constitute a security risk to the Department of State." These findings were approved by the Deputy Under Secretary of State, acting pursuant to authority delegated to him by the Secretary. n5 Again, however, the Loyalty Review Board, on post-audit, remanded the case to the Department Board for further consideration. n6 Such consideration was had, this time under the more stringent loyalty standard established by Executive Order No. 10241, n7 amending the earlier Executive Order No. 9835, and again the Department Board, on July 31, 1951, decided favorably to Service. This determination was likewise approved by the Deputy Under Secretary. However, on a further post-audit, the Loyalty Review Board decided to conduct a new hearing itself, which resulted this time in the Board's finding that there was a reasonable doubt as to Service's loyalty, and **[*367]** in its advising the Secretary of State, on December 13, 1951, that in the Board's opinion Service "should be forthwith removed from the rolls of the Department of State" and that "the Secretary should approve and adopt the proceedings" had before the Board. n8 On the same **[*368]** day the **[**1155]** Department notified Service of his discharge, **[***1408]** effective at the close of business on the following day.

----- Footnotes -----

n2 12 Fed. Reg. 1935.

n3 Hearings before the Subcommittee of the House Committee on Appropriations on the Department of State Appropriation Bill for 1950, 81st Cong., 1st Sess. 298.

n4 See *Peters v. Hobby*, 349 U.S. 331, 339-348, for a discussion of the then-existing "post-audit" procedure.

n5 See pp. 382-386 and note 16, *infra*.

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n6 This action was based on "supplementary information . . . received from the Federal Bureau of Investigation," the nature of which does not appear in the record.

n7 16 Fed. Reg. 3690.

n8 The essence of the Loyalty Review Board's action, and its relation to the prior departmental proceedings with respect to Service, are summarized in the State Department's press release of December 13, 1951, as follows:

"The Department of State announced today that the Loyalty Review Board of the Civil Service Commission has advised the Department that this Board has found a reasonable doubt as to the loyalty of John Stewart Service, Foreign Service Officer.

"Today's decision of the Loyalty Review Board is based on the evidence which was considered by the Department's Board and found to be insufficient on which to base a finding of 'reasonable doubt' as to Mr. Service's loyalty or security. Copies of the Opinions of both Boards are attached.

"The Department of State's Loyalty Security Board, on July 31, 1951, had reaffirmed its earlier findings that Service was neither disloyal nor a security risk, and the case had been referred to the Loyalty Review Board for post-audit on September 4, 1951. The Loyalty Review Board assumed jurisdiction of Mr. Service's case on October 9, 1951.

"The Chairman of the Loyalty Review Board in today's letter to the Secretary (full text attached) noted:

"The Loyalty Review Board found no evidence of membership in the Communist Party or in any organization on the Attorney General's list on the part of John Stewart Service. The Loyalty Review Board did find that there is a reasonable doubt as to the loyalty of the employee, John Stewart Service, to the Government of the United States, based on the intentional and unauthorized disclosure of documents and information of a confidential and non-public character within the meaning of subparagraph d of paragraph 2 of Part V, "Standards," of Executive Order No. 9835, as amended."

"The Opinion of the Loyalty Review Board stressed the points made above by the Chairman -- that is, it stated that the Board was not required to find and did not find Mr. Service guilty of disloyalty, but it did find that his intentional and unauthorized disclosure of confidential documents raised reasonable doubt as to his loyalty. The State Department Board while censoring [*sic*] Mr. Service for indiscretions, believed that the experience Mr. Service had been through as a result of his indiscretions in 1945 had served to make him far more than normally security conscious. It found also that no reasonable doubt existed as to his loyalty to the Government of the United States. On this point the State Department Board was reversed.

"The Chairman of the Loyalty Review Board has requested the Secretary of State to advise the Board of the effective date of the separation of Mr. Service. This request stems from the provisions of Executive Orders 9835 and 10241 -- which established the President's Loyalty Program -- and the Regulations promulgated thereon. These Regulations are binding on the Department of State.

"The Department has advised the Chairman of the Loyalty Review Board that Mr. Service's employment has been terminated."

- - - - - End Footnotes - - - - -

The authority and basis upon which the Secretary acted in discharging petitioner are set forth in an affidavit later filed by Mr. Acheson in the present litigation, in which he states:

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"2. On December 13, 1951, I received a letter from the Chairman of the Loyalty Review Board of the Civil Review Exhibits 1-15

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Service Commission submitting the Board's opinion, dated December 12, 1951, in the case of John S. Service, a Foreign Service officer of the Department of State and the plaintiff in this action.

"3. On that same day I considered what action should be taken in the light of the opinion of the Loyalty Review Board, recognizing that whatever action taken would be of utmost importance to the administration of the Government Employees Loyalty Program. I understood that the responsibility was vested in me to make the necessary determination under both Executive Order No. 9835, as [*369] amended, and under Section 103 of Public Law 188, 82d Congress, as to what action to take.

"4. Acting in the exercise of the authority vested in me as Secretary of State by Executive Order 9835, as amended by Executive Order 10241, and also by Section 103 of Public Law 188, 82d Congress (65 Stat. 575, 581), I made a determination to terminate the services of Mr. Service as a Foreign Service Officer in the Foreign Service of the United States.

"5. I made that determination solely as the result of the finding of the Loyalty Review Board and as a result of my review of the opinion of that Board. In making this determination, I did not read the testimony taken in the proceedings in Mr. Service's case before the Loyalty Review Board of the Civil Service Commission. I did not make any independent determination of my own as to whether on the evidence submitted before those boards there was reasonable doubt as to Mr. Service's loyalty. I made no independent judgment on the record in this case. There was nothing in the opinion of the Loyalty Review Board which would make it incompatible with the exercise of my responsibilities as Secretary of State to act on it. I deemed it appropriate and advisable to act on the basis of the finding and opinion of the Loyalty Review Board. In determining to terminate the employment of Mr. Service, I did not consider that I was legally bound or required by the opinion of the Loyalty Review Board to take such action. On the contrary, I considered that the opinion of the Loyalty Review Board was merely an advisory recommendation to me and that I was legally free to exercise my [*1156] own judgment as to whether Mr. Service's employment should be terminated and I did so exercise that judgment."

[*370] Section 103 of Public Law 188, 82d Congress, n9 upon which the Secretary thus relied, was the so-called McCarran Rider, first enacted as a rider to the Appropriation Act for 1947, which provided:

"Notwithstanding the provisions of . . . any other law, the Secretary of State may, in his absolute discretion, . . . terminate the employment of any officer or employee [***1409] of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States" n10

Similar provisions were re-enacted in each subsequent appropriation act until 1953. n11

----- Footnotes -----

n9 65 Stat. 581.

n10 60 Stat. 458.

n11 See 61 Stat. 288, 62 Stat. 315, 63 Stat. 456, 64 Stat. 768, 65 Stat. 581, 66 Stat. 555. All of these provisions are referred to in this opinion as "the McCarran Rider."

----- End Footnotes -----

After an attempt to secure further administrative review of his discharge proved unsuccessful, petitioner brought this action, in which he sought a declaratory judgment that his discharge was invalid; an order directing the respondents to expunge from their records all written statements reflecting that his employment had been terminated because there was a reasonable doubt as to his loyalty; and an order directing the

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Secretary to reinstate him to his employment and former grade in the Foreign Service, with full restoration of property rights and payment of accumulated salary.

While cross-motions for summary judgment were pending before the District Court, this Court rendered its decision in *Peters v. Hobby*, 349 U.S. 331, holding that under Executive Order No. 9835, the Loyalty Review Board had no authority to review, on post-audit, determinations favorable to employees made by department or agency [*371] authorities, or to adjudicate individual cases on its own motion. On the authority of that decision, the District Court declared the finding and opinion of the Loyalty Review Board respecting Service to be a nullity, and directed the Civil Service Commission to expunge from its records the Board's finding that there was reasonable doubt as to his loyalty. But since petitioner's removal rested not only upon Executive Order No. 9835, as amended, but also upon the McCarran Rider, the District Court sustained petitioner's discharge as a valid exercise of the "absolute discretion" conferred upon the Secretary by the latter provision, and granted summary judgment in favor of respondents in all other respects. n12 The Court of Appeals affirmed, 98 U. S. App. D. C. 268, 235 F.2d 215, [*372] and [**1157] this Court granted certiorari, 352 U.S. 905, because [***1410] of the importance of the questions involved to federal administrators and employees alike.

[***HR1] [1]

[***HR2] [2]

----- Footnotes -----

n12 The District Court's opinion is unreported. Actually, the Secretary could be considered to have power to discharge petitioner as he did only by virtue of the McCarran Rider. Petitioner was an officer in the Foreign Service of the United States, and as such was entitled to the protection of the Foreign Service Act of 1946, as amended. 22 U. S. C. § 801 *et seq.* That statute authorizes the Secretary of State to separate officers from the Foreign Service "for unsatisfactory performance of duty," *id.*, § 1007, or for "misconduct or malfeasance," *id.*, § 1008. However, under both sections, an officer may not be separated without a hearing before the Board of the Foreign Service established by § 211 of the Act, 22 U. S. C. § 826, and his unsatisfactory performance of duty or misconduct must be established at that hearing. No such hearing was ever afforded petitioner. Executive Order No. 9835 did not vest any additional authority in the heads of administrative agencies to discharge employees. It merely established new standards and procedures for effecting discharges under whatever independent legal authority existed for those discharges. Cf. *Cole v. Young*, 351 U.S. 536, 543-544. The only statutory provision which could be deemed to authorize the Secretary to dismiss petitioner without observance of the provisions of the Foreign Service Act was therefore the McCarran Rider. The latter provision thus was an indispensable supplement to the Department's authority if it was to proceed against petitioner under the Loyalty-Security Regulations as it did. See p. 376, *infra*.

----- End Footnotes -----

[***HR3] [3]

Petitioner here attacks the validity of the termination of his employment on two separate grounds: *First*, he contends that the Secretary's exercise of discretion was invalid since the findings and opinion of the Loyalty Review Board, upon which alone the Secretary acted, were void, because they were rendered without jurisdiction n13 and were based upon procedures assertedly contrary to due process of law. Even conceding that the Secretary's powers under the McCarran Rider were such that he was not required to state the grounds for his decision, petitioner urges, his decision cannot stand because he did in fact rely upon grounds that are invalid. See *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80; *Perkins v. Elg*, 307 U.S. 325. *Second*, petitioner contends that the Secretary's action is subject to attack under the principles established by this Court's decision in *Accardi v. Shaughnessy*, 347 U.S. 260, namely, that regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature. Regulations relating to "loyalty and security of employees" which had been promulgated by the Secretary, petitioner asserts, were intended to govern discharges effected under the McCarran Rider as well as those effected under Executive Order No. 9835, as amended, and because those regulations were violated by the Secretary in this case, so petitioner claims, his dismissal by the Secretary cannot stand. Since, for reasons discussed hereafter, we

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have concluded that petitioner's first contention must be sustained, which does not reach the first.

----- Footnotes -----

n13 See *Peters v. Hobby*, *supra*, 349 U.S., at 342-343.

----- End Footnotes -----

[*373] The questions to which we address ourselves therefore are as follows: (1) Were the departmental Regulations here involved applicable to discharges effected under the McCarran Rider? and (2) Were those Regulations violated in this instance? We do not understand the respondents to dispute that the principle of *Accardi v. Shaughnessy*, *supra*, is controlling, if we find that the Regulations were indeed applicable and were violated. We might also add that we are not here concerned in any wise with the merits of the Secretary's action in terminating the petitioner's employment.

I.

*****HR4** [4]

We think it is not open to serious question that the departmental Regulations upon which petitioner relies were applicable to McCarran Rider discharges as well as to those effected pursuant to the Loyalty-Security program. The terms of the Regulations, the fact that the Department itself proceeded in this very case under those Regulations down to the point of petitioner's discharge, representations made by the State Department to Congress relating to its practices under the McCarran Rider, and the announced wish of the President to the effect that McCarran Rider authority should be exercised subject to procedural *****1158** safeguards designed to protect "the personal liberties of employees," all combine to lead to that conclusion. We also *****1411** think it clear that these Regulations were valid, so far as their validity is put in issue by the respondents in this case.

A. The Regulations.

When the Department's proceedings against the petitioner, which resulted in the "clearances" of October 6, 1950, and July 31, 1951, were begun, the Regulations in effect were those of March 11, 1949, entitled "Regulations and Procedures relating to Loyalty and Security of **[*374]** Employees, U.S. Department of State." n14 Section 391 stated the "Authority and General Policy" of the Regulations in three subsections. Subsection 391.1 stated that it was "highly important to the interests of the United States that no person be employed in the Department who is disloyal or who constitutes a security risk." Subsection 391.2 stated that so far as the Regulations related to the handling of loyalty cases, they were promulgated in accordance with Executive Order No. 9835, which had recognized the "necessity for removing disloyal employees from the Federal service and for refusing employment therein to disloyal persons," and the "obligation to protect employees and applicants from unfounded accusations of disloyalty." Subsection 391.3 referred to the language of the McCarran Rider, noting that the Secretary of State had been granted by Congress the right, in his absolute discretion, "to terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States." "In the exercise of this right," the subsection concluded, "the Department will, so far as possible, n15 afford its employees the same protection as those provided under the Loyalty Program." And, as we shall see hereafter, the Regulations made no provision for action by the **[*375]** Secretary himself, under the McCarran Rider or otherwise, except following *unfavorable* action in the employee's case by the Department Loyalty Security Board, after full hearing before that Board on the charges against him, and approval of the Board's action by the Deputy Under Secretary. n16

----- Footnotes -----

n14 U.S. Department of State, Manual of Regulations and Procedures (1949), § 390 *et seq.*

*****HR5** [5]

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n15 This qualification is without significance here in view of the fact that the petitioner's case before the Department was handled, down to the time of his discharge by the Secretary, under these Regulations. See p. 376, *infra*. Moreover, this phrase was deleted in the 1951 revision of the Regulations, as we note hereafter, p. 376, *infra*, and the respondents have insisted here that the 1951 revision is controlling, see p. 382, *infra*.

n16 We follow the parties in this case in using interchangeably the terms "Deputy Under Secretary" and "Assistant Secretary -- Administration." When the Department's 1949 Regulations were promulgated, the official charged with duties under them was the "Assistant Secretary -- Administration." At some time thereafter, however, that official's functions were apparently transferred to a Deputy Under Secretary. Cf. Act of May 26, 1949, §§ 3, 4, 63 Stat. 111. To avoid confusion, we have used exclusively the latter title in the text of this opinion, regardless of its technical correctness in the particular instance.

- - - - - End Footnotes - - - - -

In May and September 1951, prior to the time of petitioner's discharge, the Regulations were revised, and the amended § 391 provided even more explicitly than the original that the procedures and standards established were intended to govern exercise of the authority granted by the McCarran Rider. After stating in the first subsection n17 that the *****1412** Regulations ****1159** were adopted to implement the Department's policy that "no person be employed in the Department n18 who is disloyal or who constitutes a security risk," the section continues in the next two subsections n19 to state in effect that the Regulations relating to the handling of *loyalty* cases were promulgated in accordance with Executive Order No. 9835, and that those relating to *security* cases were promulgated under ***376** the authority of the Act of August 26, 1950 n20 and the McCarran Rider. n21 The phrase "so far as possible," in reference to McCarran Rider authority, was deleted. The Regulations thus drew upon all the sources of authority available to the Secretary with reference to such cases, and purported to set forth definitively the procedures and standards to be followed in their handling.

- - - - - Footnotes - - - - -

n17 "391.1 *Policy*." For the Department's 1951 Regulations see U.S. Department of State, Manual of Regulations and Procedures (1951), Vol. I, § 390 *et seq*.

n18 "Department" is defined as including "the Foreign Service of the United States." § 391.3.

n19 "391.2 *Loyalty Authority*," and "391.3 *Security Authority*."

n20 This statute is referred to in the subsection as "Public Law 733, 81st Congress," being the Act of August 26, 1950, 64 Stat. 476, 5 U. S. C. §§ 22-1, 22-3, which gave to the State Department, among other departments and agencies of the Government, suspension and dismissal powers over their civilian employees when deemed necessary "in the interest of the national security of the United States." Cf. *Cole v. Young*, 351 U.S. 536.

n21 Referred to in the subsection as "General Appropriations Act, 1951, Section 1213, Public Law 759, 81st Congress."

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----- End Footnotes-----B. *The Administrative Proceedings in this Case.*

The administrative proceedings held in petitioner's case were unquestionably conducted on the premise that the Regulations were applicable in this instance. The charges were based on the Regulations, and a copy of the Regulations was sent to Service along with the letter of charges. The hearing was scheduled under § 395 of the 1949 Regulations. In its opinion exonerating Service, the Department Board noted, following the Regulations, that "the issues here are (1) loyalty, and (2) security risk." The Board's favorable recommendations came twice before the Deputy Under Secretary for review under §§ 395.6 and 396.7 of these Regulations, and were approved by him. Later, before the Civil Service Commission's Loyalty Review Board, an additional charge was added to the Department's original charges by stipulation of the parties, and the stipulation expressly referred to §§ 392.2 and 393.1a of the Regulations. Indeed, at no time during any of the administrative proceedings [*377] in this case was there any suggestion that the Regulations were not applicable to the entire proceedings and binding upon all parties to the case.

C. *The Department's Representations to Congress.*

In the spring of 1950, the Department of State submitted to an investigating subcommittee of the Senate Foreign Relations Committee a comprehensive report on the procedures and standards used by the Department in dealing with employee loyalty and security problems. After describing the procedures utilized by the Department in the early post-war period, the report continued as follows:

"... The policy of the Department prior to the passage of the McCarran rider was that if there was reasonable doubt as to an employee's loyalty, his employment was required to be terminated. The McCarran rider freed the hands of the Department in making this policy [***1413] effective. Basically any reasonable doubt of an employee's loyalty if based on substantial evidence was to be resolved in favor of the Government. After enactment of the McCarran rider the Department did not contemplate that the legislation required or that the people of this [**1160] country would countenance the use of 'Gestapo' methods or harassment or persecution of loyal employees who were American citizens on flimsy evidence or hearsay and innuendo. The Department proceeded to develop appropriate procedures designed to implement fully and properly the authority granted the Department under the McCarran rider.

"The McCarran rider . . . was the first of a series of provisions included in each subsequent appropriation act which authorized the Secretary of State in his absolute discretion to 'terminate the employment [*378] of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States.' Accordingly, effective during the 1947 fiscal year, and each fiscal year thereafter, the Department considered the McCarran rider as an additional standard for dealing with security problems in the Department. . . . *In [its] considered view the McCarran rider was subject to procedural limitations.* The McCarran rider was not interpreted as permitting reckless discharge or the exercise of arbitrary whims.

....

"The President's loyalty order of March 21, 1947, prescribed a comprehensive set of standards governing the executive branch as a whole. It was deemed applicable to the Department of State, as well as to other agencies. *The unique powers conferred on the Department as a result of continuous reenactment of the McCarran rider led the Department to promulgate regulations which would encompass its duties and powers both under the Executive order and under the McCarran rider.*" n22

----- Footnotes-----

n22 S. Rep. No. 2108, 81st Cong., 2d Sess. 15-16 (emphasis supplied).

----- End Footnotes-----

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D. *The President's Letter.*

That the policy of the Secretary to subject his plenary powers under the McCarran Rider to procedural limitations was deliberately adopted, and rested on decisions taken at the highest level, is evidenced by a letter dated September 6, 1950, from President Truman to the Secretary of State, which was made a part of the record below. In that letter, the President advised the Secretary that he had just approved H. R. 7786, the General Appropriation Act, 1951, 64 Stat. 595, 768, § 1213 of **[*379]** which re-enacted the McCarran Rider for the current fiscal year. The President continued:

"I am sure you will agree that in exercising the discretion conferred upon you by Section 1213, every effort should be made to protect the national security without unduly jeopardizing the personal liberties of the employees within your jurisdiction. Procedures designed to accomplish these two objectives are set forth in Public Law 733, 81st Congress, which authorizes the summary suspension of civilian officers and employees of various departments and agencies of the Government, including the Department of State.

"In order that officers and employees of the Department of State may be afforded the same protection as that afforded by Public Law 733, it is my desire that you follow the procedures set forth in that law in carrying out the provisions of section **[***1414]** 1213 of the General Appropriations Act."

In view of the terms of the Regulations, the course of procedure followed by the Department, and the background materials we have noted, we think that **[**1161]** there is no room for doubt that the departmental Regulations for the handling of loyalty and security cases were both intended and considered by the Department to apply in this instance. We cannot accept either of the respondents' present arguments to the contrary. The first argument, as put by the District Court, whose language was adopted by the Court of Appeals, n23 is:

". . . It was not the intent of Congress that the Secretary of State bind himself to follow the provisions of Executive Order 9835 in dismissing employees under Public Law 188. This power of summary dismissal would not have been granted the **[*380]** Secretary of State by the Congress if the Congress was satisfied that the interests of this country were adequately protected by Executive Order 9835."

[*HR6]** [6]

[*HR7]** [7]

We gather from this that the lower courts thought that the Secretary was powerless to bind himself by these Regulations as to McCarran Rider discharges based on loyalty or security grounds. We do not think this is so. Although Congress was advised in unmistakable terms that the Secretary had seen fit to limit by regulations the discretion conferred upon him, see pp. 377-378, *supra*, it continued to re-enact the McCarran Rider without change for several succeeding years. n24 Cf. *Labor Board v. Gullett Gin Co.*, 340 U.S. 361, 366; *Fleming v. Mohawk Co.*, 331 U.S. 111, 116. Nor do we see any inconsistency between this statute and the effect of the Regulations upon the Secretary under *Accardi v. Shaughnessy*, 347 U.S. 260, already discussed, pp. 372-373, *supra*. *Accardi*, indeed, involved statutory authority as broad as that involved here. n25

----- Footnotes -----

n23 98 U. S. App. D. C., at 271, 235 F.2d, at 218.

n24 See note 11, *supra*.

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n25 *Id.*, § 19 (c) of the Immigration Act of 1917, as amended: "In the case of any alien (other than one to

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whom subsection (d) is applicable who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may . . . suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act." 62 Stat. 1206, 8 U. S. C. (1946 ed., Supp. V) § 155 (c).

----- End Footnotes-----

The respondents' second argument is that the Regulations refer explicitly to discharges based on loyalty and security grounds, but make no reference to discharges **[*381]** deemed "necessary or advisable in the interests of the United States" -- the sole McCarran Rider standard -- and hence were not applicable to such discharges. But, as has already been demonstrated, both the Regulations and their historical context show that the Regulations were applicable to McCarran Rider discharges, at least to the extent that they were based on loyalty or security grounds, and we do not see how it could seriously be considered, as the respondents now seem to urge, that Service was not discharged on such grounds. The Secretary's affidavit, n26 and also the Department's formal notice to Service of his discharge, n27 **[***1415]** both of which, among other things, refer to Executive Order **[**1162]** No. 9835 as well as to the McCarran Rider as authority for the Secretary's action, unmistakably show that the discharge was based on such grounds.

----- Footnotes -----

n26 See pp. 368-369, *supra*.

n27 This notice read:

"My dear Mr. Service:

"The Secretary of State was advised today by the Chairman of the Loyalty Review Board of the U.S. Civil Service Commission that the Loyalty Review Board has found that there is a reasonable doubt as to your loyalty to the Government of the United States. This finding was based on the intentional and unauthorized disclosure of documents and information of a confidential and non-public character within the meaning of subparagraph d of Paragraph 2 of Part V of Executive Order 9835, as amended. The Loyalty Review Board further advised that it found no evidence of membership on your part in the Communist Party or in any organizations on the Attorney General's list.

"Pursuant to the foregoing, the Secretary of State, under the authority of Executive Order 9835, as amended, and Section 103 of Public Law 188, 82nd Congress, has directed me to terminate your employment in the Foreign Service of the United States as of the close of business December 14, 1951.

"In view thereof, you are advised that your employment in the Foreign Service of the United States is hereby terminated effective [at the] close of business December 14, 1951."

----- End Footnotes-----

[*382] We now turn to the question whether the manner of petitioner's discharge was consistent with the Department's Regulations.

II.

Preliminarily, it must be noted that the parties are in dispute as to which of the two sets of Regulations -- those of 1949 or those of 1951 -- is applicable to petitioner's case, assuming, as we have held, that one or the other must govern. The departmental proceedings against petitioner were begun and were conducted under the 1949 Regulations. However, prior to petitioner's discharge in December 1951, the revised

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Regulations of May and September 1951 had become effective, and it is under those Regulations, the respondents say, that Service's discharge must be judged. n28 On the other hand, the petitioner contends that the 1949 Regulations remained applicable to his case, since he was not advised of the existence of the 1951 Regulations until after his discharge had been accomplished and the present court proceedings had been commenced. n29 However, it is unnecessary for us to make a choice between the two sets of Regulations, for we find the manner in which petitioner was discharged to have been inconsistent with both.

- - - - - Footnotes - - - - -

n28 The respondents argue that the proper rule to be applied is that of *Vandenberg v. Owens-Illinois Glass Co.*, 311 U.S. 538, holding that a change in the applicable law after a case has been decided by a *nisi prius* court, but before decision on appeal, requires the appellate court to apply the changed law. And see *Ziffrin, Inc. v. United States*, 318 U.S. 73.

n29 Petitioner argues that the decisions cited in note 28, *supra*, are not in point here because, *inter alia*, the changed regulations were invalid as to him under the Federal Register Act, 49 Stat. 502, 44 U. S. C. § 307, and the Administrative Procedure Act, 60 Stat. 238, 5 U. S. C. § 1002, because not published in the Federal Register.

- - - - - End Footnotes - - - - -

[*383] A. *The 1949 Regulations.*

[***HR8] [8]

In terms of the 1949 Regulations, the vice we find in petitioner's discharge is that the Secretary had no right to dismiss the petitioner for loyalty or security reasons unless and until the Deputy Under Secretary, acting upon the findings of the Department's Loyalty Security Board, had recommended such dismissal. In other words, the Deputy Under Secretary in this instance having approved the findings of the Loyalty Security Board favorable to petitioner, the Secretary, consistently [***1416] with these Regulations, could not, without more, dismiss the petitioner.

The basis for this conclusion will appear from a consideration of ^{HN1}the procedural scheme established by the 1949 Regulations relating to loyalty and security cases. In outline that scheme involved the following procedural steps:

(1) The filing of charges, upon notice to the employee involved, accompanied by adequate factual details as to their basis, and a statement as to the employee's [***1163] work and pay status pending further action. n30

(2) A hearing on such charges, if requested by the employee, before the Department's Loyalty Security Board, whose determination, together with the record of the hearings, were then to be forwarded to the Deputy Under Secretary for review. n31

(3) Upon such review the Deputy Under Secretary was empowered (i) to return the case to the Board for further investigation or action; (ii) to decide in favor of the employee, and to so notify him [*384] in writing; or (iii) to decide against the employee, and to notify him of his right to appeal to the Secretary within 10 days thereafter. n32

^{HN2}(4) In the event of such an appeal, the Secretary was empowered (i) to decide favorably to the employee, and to so notify him in writing; or (ii) to decide against the employee, and to notify him of such decision, and further, in a loyalty case, of his right to appeal to the Loyalty Review Board within 20 days thereafter. n33

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(5) If, upon such an appeal, the Loyalty Review Board decided adversely the employee and made an "advisory" recommendation to the Secretary that the employee should be removed from employment under the applicable loyalty standards, the Department was to take prompt administrative action to that end. On the other hand if the Board decided favorably to the employee the Secretary was empowered (i) to restore the employee to duty and "close the case"; (ii) to permit the employee to resign; or (iii) to terminate his employment under the authority conferred by the McCarran Rider "or other appropriate authority." n34

- - - - - Footnotes - - - - -

n30 §§ 394.13, 394.15, 395.1.

n31 §§ 395.1, 395.53.

n32 §§ 395.6, 396.11.

n33 §§ 396.2, 396.3.

n34 §§ 396.4, 396.5.

- - - - - End Footnotes- - - - - *****HR9** [9]

From this survey, three things appear as to the handling of loyalty and security cases under the 1949 Regulations which are of significance in this case. First, ^{HN3} following the decision of the Deputy Under Secretary upon a determination of the Department Loyalty Security Board, there was to be an appeal to the Secretary *only* if the Deputy's action had been adverse to the employee. In other words, under these Regulations the action of the **[*385]** Deputy Under Secretary, if *favorable* to the employee, was to be final, the Secretary reserving to himself power to act further only if his Deputy's action was *unfavorable* to the employee. n35 Second, there was likewise *****1417** an appeal to the Loyalty Review Board from the Secretary's decision *only* if his action was *adverse* to the employee. Again, in other words, a decision of the Secretary favorable to the employee was to be final, and immune *****1164** from further action by the Loyalty Review Board on post-audit, a rule since confirmed by our decision in *Peters v. Hobby, supra*. Third, the Secretary reserved the right to deal with such a case under his McCarran Rider authority, outside the Regulations, only in instances where, upon an employee's appeal to the Loyalty Review Board from an unfavorable decision by the Secretary, the decision of that body was favorable to the employee.

- - - - - Footnotes - - - - -

n35 That this was understood to be the effect of the Regulations is indicated by Department of State Press Release No. 247, March 13, 1950, which is reprinted in S. Rep. No. 2108, 81st Cong., 2d Sess. 254. Deputy Under Secretary of State John E. Peurifoy is there quoted as stating, in reply to charges made on the floor of the Senate:

". . . I am in full charge of loyalty matters and . . . am fully prepared to deal with these charges.

"Gen. George C. Marshall, as Secretary of State, vested in me full responsibility and authority for carrying out the loyalty and security program of the Department of State, and I have continued to exercise the same responsibility and authority under Secretary Dean Acheson.

"My decisions on matters of loyalty and security within the Department are *final*, subject, however, under the law, in certain instances to appeal to the Secretary and the President's Loyalty Review Board. Since the loyalty and security program was launched in the Department, however, there has not been a single instance

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in which a decision made by me has been reversed or overruled in any way by Secretary Acheson." (Emphasis supplied.)

----- End Footnotes-----

Granted, as the respondents argue, that these Regulations gave the petitioner (a) no right of appeal to the Secretary from the Deputy Under Secretary's *favorable* [*386] decision, and (b) no right of appeal at all from the action of the Loyalty Review Board, it does not follow, as the respondents then argue, that the Secretary was free to dismiss the petitioner. For, as has already been observed, the Regulations left the Secretary *functus officio* with respect to such cases once the Deputy Under Secretary had made a determination favorable to the employee. So here when the Deputy Under Secretary approved the Loyalty Security Board's action of July 31, 1951, clearing the petitioner, under these Regulations the case against Service was closed. n36 Hence Service's subsequent discharge by the Secretary must be deemed to have been in contravention of these 1949 Regulations. n37 The situation under the 1949 Regulations was thus closely analogous to that which obtained in *Accardi v. Shaughnessy, supra*. There, the Attorney General bound himself not to exercise his discretion until he had received an impartial recommendation from a subordinate board. Here, the [*387] Secretary bound himself not to act at all in cases such as this, except upon appeal by employees from determinations unfavorable to them. We see no relevant ground for distinction.

----- Footnotes-----

n36 Section 396.7 of the Regulations provided:

"If the Assistant Secretary -- Administration or the Secretary of State shall, during his consideration of any case, decide affirmatively that an officer or employee is not disloyal and does not constitute a security risk and that his case should be closed, such officer or employee shall be restored to duty, if suspended, and the record shall show such decision."

In holding as we do we by no means imply that under these Regulations the action of the Deputy Under Secretary had the effect of "closing" petitioner's case irrevocably and beyond hope of recall. No doubt proper steps could have been taken to reopen it in the Department. But, consistent with his Regulations, we think that the Secretary could in no event have discharged the petitioner, as he did here, without the required action first having been taken by the Department's Loyalty Security Board and the Deputy Under Secretary.

n37 In view of this conclusion, it becomes unnecessary to consider the other respects in which petitioner claims that his discharge contravened the 1949 Regulations.

----- End Footnotes----- -B. The 1951 Regulations.

[***HR10] [10]

A similar conclusion must be reached if the 1951 Regulations are deemed applicable to petitioner's case. Section 393.1 of those Regulations provides:

[***1418] HN4* "The standard for removal from employment in the Department of State under the authority referred to in section 391.3 shall be that on all the evidence reasonable grounds exist for belief that the removal of the officer or employee involved is necessary or advisable in the interest of national security. *The decision shall be reached after consideration of the complete file, arguments, briefs, and testimony presented.*" (Emphasis added.)

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The "authority referred to in sect 391.3," as we have already noted, included the McCarran Rider. n38 In light of the former Secretary's affidavit n39 there is no room for dispute that no attempt **[**1165]** was made to comply with this section of the Regulations, n40 as indeed the respondents' brief virtually concedes.

----- Footnotes -----

n38 See pp. 375-376, *supra*.

n39 See pp. 368-369, *supra*.

[*HR11]** [11]

n40 We do not, of course, imply that the Regulations precluded the Secretary from discharging any individual without *personally* reading the "complete file" and considering "all the evidence." No doubt the Secretary could delegate that duty. But nothing of the kind appears to have been done here.

----- End Footnotes----- **[***HR12]** [12]

The respondents argue that this provision was not violated in petitioner's case because "the only decision to which Section 393.1 relates is that the removal of the **[*388]** officer or employee involved is 'necessary or advisable in the interest of national security,' " the standard laid down in the Act of August 26, 1950, n41 and that "nothing in this section purports to prescribe the procedure to be followed in determining that removal is 'necessary or advisable in the interests of the United States,'" the standard contained in the McCarran Rider. But ^{HNS}since § 391.3, which is incorporated by reference into § 393.1, specifically subjected the exercise of the Secretary's McCarran Rider authority, in such cases as this, to the operation of the 1951 Regulations, it seems clear that the necessary effect of § 393.1 was to subject the exercise of that authority to the substantive standards prescribed by that section, namely, those established by the Act of August 26, 1950, n42 and also to the procedural requirements that such cases must be decided "on all the evidence" and "after consideration of the complete file, arguments, briefs, and testimony presented." The essential meaning of the section, in other words, was that the Secretary's decision was required to be on the merits. While it is of course true that under the McCarran Rider the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so, as we have already held, and having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them.

----- Footnotes -----

n41 See note 20, *supra*.

n42 Sections 393.2 and 393.3 further refined the standard by defining five classes of persons constituting security risks, and listing five factors which were to be taken into account, together with possible mitigating circumstances.

----- End Footnotes-----

It being clear that § 393.1 was not complied with by the Secretary in this instance, it follows that under the *Accardi* doctrine petitioner's dismissal cannot stand, **[*389]** regardless of whether the 1951, rather than the 1949, Regulations are deemed applicable in his case. n43

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----- Footnotes -----

n43 Because of this conclusion it is unnecessary to deal with the other respects in which petitioner claims his discharge violated the 1951 Regulations.

----- End Footnotes -----

For the foregoing reasons the judgment of the Court of Appeals must be reversed, and the case remanded to the District Court for *****1419** further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE CLARK took no part in the consideration or decision of this case.

REFERENCES: ♦ [Return To Full Text Opinion](#)

Annotation References:

1. Supreme Court decisions involving loyalty investigations, 95 L ed 875, 877 and 100 L ed 661, 663.
2. Administrative decision by officer not present when evidence was taken, 18 ALR 2d 606.

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Citation: **359 U.S. 535**

*359 U.S. 535, *; 79 S. Ct. 968, **;
3 L. Ed. 2d 1012, ***; 1959 U.S. LEXIS 899*

VITARELLI v. SEATON, SECRETARY OF THE INTERIOR, ET AL.

No. 101

SUPREME COURT OF THE UNITED STATES

359 U.S. 535; 79 S. Ct. 968; 3 L. Ed. 2d 1012; 1959 U.S. LEXIS 899

April 1-2, 1959, Argued

June 1, 1959, Decided

PRIOR HISTORY:

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DISPOSITION: 102 U. S. App. D. C. 316, 253 F.2d 338, reversed.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner employee challenged an order of the United States Court of Appeals for the District of Columbia Circuit, affirming an order of the district court granting summary judgment for respondent Secretary of the Interior. After the Secretary had terminated the employee on security grounds, he attempted to do so based on the employee's at will status.

OVERVIEW: Petitioner employee was appointed in 1952 by respondent Secretary of the Interior as a schedule A employee. Respondent's predecessor notified petitioner of his suspension, citing petitioner's association with the Communist Party, among other things. A notice of dismissal was sent to petitioner, citing the original charges. A Notification of Personnel Action followed. A hearing resulted in dismissal, and petitioner filed suit in a district court. Later, a second Notification, omitting any reason for dismissal, was filed with the district court and delivered to petitioner. The district court granted summary judgment to respondent, which the court of appeals affirmed. On appeal, the court found numerous instances of violations of petitioner's rights. The court rejected the argument that petitioner was only entitled to expungement of his records because respondent could have fired him at any time for no reason, because respondent gratuitously decided to give the reason of national security, and he was obligated to conform to Order No. 2738. Because petitioner's proceedings fell substantially short of the regulations, the court held that the dismissal was illegal and of no effect.

OUTCOME: The court found that respondent Secretary of the Interior had violated petitioner employee's rights after his termination for suspected affiliation with the Communist Party. The court held the termination to be illegal and ineffective because respondent gratuitously gave the reason of national security, and then failed to conform to applicable departmental regulations under those circumstances.

CORE TERMS: notice, regulation, national security, departmental, security officer, notification, informant, delivery, expunging, effective, summarily, reinstatement, cross-examine, confidential, discharged, designated, quota, government employees, fired, entitled to reinstatement, retroactively, sympathetic, suspension, questioned, severance, personnel, reciting, revision, resident, doctor

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Headnote: 102 U.S. App. D.C. 316, 253 F.2d 338, reversed. **RE 13**
H.H. v. Sec. Order No. 10450, 18 Fed. Reg. 2489 (1953), the Act of August 26, 1950, 64 Stat. 476, 5

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U.S.C.S. § 22-1 et seq., and Department of the Interior Order No. 2738, all relate to discharges of government employees on security or loyalty grounds. The statute does not apply to government employees in positions not designated as "sensitive." [More Like This Headnote](#)


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HN2  The Act of August 26, 1950, 64 Stat. 476, 5 U.S.C.S. § 22-1 et seq., did not permit the discharge of nonsensitive employees pursuant to procedures authorized by that Act if those procedures were more summary than those to which the employee would have been entitled by virtue of any pre-existing statute or regulation. [More Like This Headnote](#)


Governments > Federal Government > Employees & Officials 

HN3  First, § 15 (a) of Department of the Interior Order No. 2738 requires that the statement of charges served upon an employee at the time of his suspension on security grounds shall be as specific and detailed as security considerations, including the need for protection of confidential sources of information, permit and shall be subject to amendment within 30 days of issuance. [More Like This Headnote](#)


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HN4  Sections 21 (a) and (e) of Department of the Interior Order No. 2738 require that hearings before security hearing boards shall be "orderly" and that reasonable restrictions shall be imposed as to relevancy, competency, and materiality of matters considered. [More Like This Headnote](#)

Governments > Federal Government > Employees & Officials 

HN5  Section § 21 (c)(4) gives the employee the right to cross-examine any witness offered in support of the charges. It is apparent from an over-all reading of the regulations that it was not contemplated that this provision should require the Department to call witnesses to testify in support of any or all of the charges, because it was expected that charges might rest on information gathered from or by "confidential informants." [More Like This Headnote](#)

Governments > Federal Government > Employees & Officials 

HN6  Section 21 (e) of the Order, which provides in part that if the employee is or may be handicapped by the nondisclosure to him of confidential information or by lack of opportunity to cross-examine confidential informants, the hearing board shall take that fact into consideration, thus implying that the employee is to have the right to cross-examine nonconfidential informants who provide material taken into consideration by the board. [More Like This Headnote](#)

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SYLLABUS: Petitioner was an employee of the Department of the Interior in a position not designated as "sensitive." He was not a veteran, had no protected Civil Service status, and could have been discharged summarily without cause. Purporting to proceed under the Act of August 26, 1950, Executive Order No. 10450 and departmental regulations prescribing the procedure to be followed in "security risk" cases, the Secretary suspended him and served him with written charges that his "sympathetic association" with Communists or Communist sympathizers, and other similar alleged activities, tended to show that his continued employment might be "contrary to the best interests of national security." At a subsequent hearing before a security hearing board, no evidence was adduced in support of these charges and no witness testified against petitioner; but he and four witnesses who testified for him were subjected to an extensive cross-examination which went far beyond the activities specified in the charges. Subsequently, he was sent a notice of dismissal, effective September 10, 1954, "in the interest of national security" and for the reasons set forth in the charges. In 1956, he sued for a declaratory judgment that his discharge was illegal and an injunction directing his reinstatement. While the case was pending, a copy of a "notification of personnel action," dated September 21, 1954, and reciting that it was "a revision of and replaces the original bearing the same date," was filed in the court and a copy was delivered to petitioner. This notification was identical with one issued September 21, 1954, except that it omitted any reference to the reason for petitioner's discharge and to the authority under which it was carried out. *Held:* Petitioner's dismissal was illegal and he is entitled to reinstatement. Pp. 536-546.

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(a) Having chosen to proceed against petitioner on security grounds, the Secretary was bound by the regulations which he had promulgated for dealing with such cases, even though petitioner could have been discharged summarily and without cause independently of those regulations. Pp. 539-540.

(b) The record shows that the proceedings leading to petitioner's dismissal from Government service on grounds of national security violated petitioner's procedural rights under the applicable departmental regulations. Therefore, his dismissal was illegal and of no effect. Pp. 540-545.

(c) Delivery to petitioner in 1956 of the revised "notification of personnel action" dated September 21, 1954, which was plainly intended only as a grant of relief to petitioner by expunging the grounds of the 1954 discharge, cannot be treated as an exercise of the Secretary's summary dismissal power as of the date of its delivery to petitioner. Pp. 545-546.

(d) Petitioner is entitled to reinstatement, subject to any lawful exercise of the Secretary's authority hereafter to dismiss him from employment. P. 546.

COUNSEL: Clifford J. Hynning argued the cause for petitioner. With him on the brief was Harry E. Sprogell.

John G. Laughlin, Jr. argued the cause for respondents. With him on the brief were Solicitor General Rankin, Assistant Attorney General Doub and Samuel D. Slade.

JUDGES: Warren, Black, Frankfurter, Douglas, Clark, Harlan, Brennan, Whittaker, Stewart

OPINIONBY: HARLAN

OPINION: [*536] [***1015] [**971] MR. JUSTICE HARLAN delivered the opinion of the Court.

This case concerns the legality of petitioner's discharge as an employee of the Department of the Interior. Vitarelli, an educator holding a doctor's degree from Columbia University, was appointed in 1952 by the Department of the Interior as an Education and Training Specialist in the Education Department of the Trust Territory of the Pacific Islands, at Koror in the Palau District, a mandated area for which this country has responsibility.

By a letter dated March 30, 1954, respondent Secretary's predecessor in office notified petitioner of his suspension from duty without pay, effective April 2, 1954, assigning as ground therefor various charges. Essentially, the charges were that petitioner from 1941 to 1945 [*537] had been in "sympathetic association" with three named persons alleged to have been members of or in sympathetic association with the Communist Party, and had concealed from the Government the true extent of these associations at the time of a previous inquiry into them; that he had registered as a supporter of the American Labor Party in New York City in 1945, had subscribed to the USSR Information Bulletin, and had purchased copies of the Daily Worker and New Masses; and that because such associations and activities tended to show that petitioner was "not reliable or trustworthy" his continued employment might be "contrary to the best interests of national security."

Petitioner filed a written answer to the statement of charges, and appeared before a security hearing board on June 22 and July 1, 1954. At this hearing no evidence was adduced by the Department in support of the charges, nor did any witness testify against petitioner. Petitioner testified at length, and presented four witnesses, and he and the witnesses were extensively cross-examined by the security officer and the members of the hearing board. On September 2, 1954, a notice of dismissal effective September 10, 1954, was sent petitioner over the signature of the Secretary, reciting that the dismissal was "in the interest of national security for the reasons specifically set forth in the letter of charges dated March 30, 1954." This was followed on September 21, 1954, with the filing of a "Notification of Personnel Action" setting forth the Secretary's action. The record does not show that a copy of this document was ever sent to petitioner.

After having failed to obtain reinstatement [***1016] by a demand upon the Secretary, petitioner filed suit in the United States District Court for the District of Columbia seeking a declaration that his dismissal had been illegal and ineffective and an injunction requiring his reinstatement. On October 10, 1956, while the case was pending in the [*538] District Court, a copy of a new "Notification of Personnel Action," dated September 21, 1954, and reciting that it was "a revision of and replaces the original bearing the same date,"

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was filed in the District Court, and another copy of this **[**972]** document was delivered to petitioner shortly thereafter. This notification was identical with the one already mentioned, except that it omitted any reference to the reason for petitioner's discharge and to the authority under which it was carried out. n1 Thereafter the District Court granted summary judgment for the respondent. That judgment was affirmed by the Court of Appeals, one judge dissenting. 102 U. S. App. D. C. 316, 253 F.2d 338. We granted certiorari to consider the validity of petitioner's discharge. 358 U.S. 871.

----- Footnotes -----

n1 An affidavit of the custodian of records of the Civil Service Commission, filed in the District Court together with this revised notification, states "That all records of the said Commission have been expunged of all adverse findings made with respect to Mr. William Vincent Vitarelli under Executive Order 10450."

----- End Footnotes -----

The Secretary's letter of March 30, 1954, and notice of dismissal of September 2, 1954, both relied upon ^{HN1} Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953), the Act of August 26, 1950, 64 Stat. 476, 5 U. S. C. § 22-1 *et seq.*, and Department of the Interior Order No. 2738, all relating to discharges of government employees on security or loyalty grounds, as the authority for petitioner's dismissal. In *Cole v. Young*, 351 U.S. 536, this Court held that the statute referred to did not apply to government employees in positions not designated as "sensitive." Respondent takes the position that since petitioner's position in government service has at no time been designated as sensitive the effect of *Cole*, which was decided after the 1954 dismissal of petitioner, was to render also inapplicable to petitioner Department of the Interior Order No. 2738, under which the proceedings relating to petitioner's dismissal were had. It is urged **[*539]** that in this state of affairs petitioner, who concededly was at no time within the protection of the Civil Service Act, Veterans' Preference Act, or any other statute relating to employment rights of government employees, and who, as a "Schedule A" employee, could have been summarily discharged by the Secretary at any time without the giving of a reason, under no circumstances could be entitled to more than that which he has already received -- namely, an "expunging" from the record of his 1954 discharge of any reference to the authority or reasons therefor.

[*HR1]** [1]

[*HR2]** [2]

Respondent misconceives the effect of our decision in *Cole*. It is true that the Act of August 26, 1950, and the Executive Order did not alter the power of the Secretary to discharge summarily an employee in petitioner's status, without the giving of any reason. Nor did the Department's own regulations preclude such a course. Since, however, the Secretary gratuitously decided to give a reason, and that reason was national security, he was obligated to conform to the procedural standards he had formulated **[***1017]** in Order No. 2738 for the dismissal of employees on security grounds. *Service v. Dulles*, 354 U.S. 363. That Order on its face applies to *all* security discharges in the Department of the Interior, including such discharges of Schedule A employees. *Cole v. Young* established that ^{HN2} the Act of August 26, 1950, did not permit the discharge of nonsensitive employees pursuant to procedures authorized by that Act if those procedures were more summary than those to which the employee would have been entitled by virtue of any pre-existing statute or regulation. That decision cannot, however, justify noncompliance by the Secretary with regulations promulgated by him in the departmental Order, which as to petitioner afford greater procedural protections in the case of dismissal stated to be for security reasons than in the case of dismissal without any statement **[**973]** of reasons. Having chosen to proceed against petitioner on security **[*540]** grounds, the Secretary here, as in *Service*, was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulations he could have discharged petitioner summarily.

[*HR3]** [3]

Petitioner makes various contentions as to the constitutional invalidity of the procedures provided by Order No. 2738. He further urges that even assuming the validity of the governing procedures, his dismissal cannot stand because the notice of suspension and hearing given him did not comply with the Order. We find it unnecessary to reach the constitutional issues, for we think that petitioner's second position is well taken and must be sustained.

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*****HR4** [4]

Preliminarily, it should be said that departures from departmental regulations in matters of this kind involve more than mere consideration of procedural irregularities. For in proceedings of this nature, in which the ordinary rules of evidence do not apply, in which matters involving the disclosure of confidential information are withheld, and where it must be recognized that counsel is under practical constraints in the making of objections and in the tactical handling of his case which would not obtain in a cause being tried in a court of law before trained judges, scrupulous observance of departmental procedural safeguards is clearly of particular importance. n2 In this instance an examination of the record, and of the transcript of the hearing before the departmental security board, discloses that petitioner's procedural rights under the applicable regulations were violated in at least three material respects in the proceedings which terminated in the final notice of his dismissal.

----- Footnotes -----

n2 As already noted, we do not reach the question of the constitutional permissibility of an administrative adjudication based on "confidential information" not disclosed to the employee.

----- End Footnotes -----

*****HR5** [5]

^{HN3}First, § 15 (a) of Order No. 2738 requires that the statement of charges served upon an employee at the time **[*541]** of his suspension on security grounds "shall be as specific and detailed as security considerations, including the need for protection of confidential sources of information, permit . . . and shall be subject to amendment within 30 days of issuance." Although the statement of charges furnished petitioner appears on its face to be reasonably specific, n3 the transcript *****1018** of hearing establishes that the statement, which was never amended, cannot conceivably be said in fact to be as specific and detailed as "security considerations . . . permit." For petitioner was questioned by the security officer and by the hearing board in great detail concerning his association with and knowledge of various persons and organizations nowhere mentioned in the statement of charges, n4 and at length concerning his activities in Bucks County, *****974** Pennsylvania, and elsewhere after 1945, activities as to which the charges are also completely silent. These questions were presumably asked because they were deemed relevant to the inquiry before the board, and the very fact that they were asked and thus spread on the record is conclusive **[*542]** indication that "security considerations" could not have justified the omission of any statement concerning them in the charges furnished petitioner.

----- Footnotes -----

n3 The substance of the charges has been stated on pp. 536-537, *supra*.

n4 The statement of charges referred to petitioner's alleged associations with only three named persons, "F , W , and W ." During the course of the hearing the security officer, however, asked "How well did you know L B ? . . . Did you ever meet H B C ? . . . Did you ever remember meeting a J L ?" Further, petitioner was questioned as to his knowledge of and relationships with a wide variety of organizations not mentioned in the statement of charges. Thus he was asked: "Do you know what Black Mountain Transcendentalism is? . . . Do you recall an organization by the name of National Council for Soviet-American Friendship? . . . How about the Southern Conference for Human Welfare? . . . What is the organization called the Joint Antifascist Refugee Committee? . . . Have you ever had any contact with the Negro Youth Congress? . . . How about Abraham Lincoln Brigade? . . . Have you ever heard of a magazine called 'Cooperative Union'? . . . I was wondering whether you had ever heard of Consumers Union?"

----- End Footnotes -----

*****HR6** [6]

^{HN4}Review Exhibits 1-15 and (e) require that hearings before security hearing boards shall be "orderly" and Aug. 24, 2004 Session

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that "reasonable restrictions shall be imposed as to relevancy, competency, and materiality of matters considered." The material set forth in the margin, taken from the transcript, and illustrative rather than exhaustive, shows that these indispensable indicia of a meaningful hearing were not observed. n5 It is *****1019** not an overcharacterization to say ***543** that as the hearing ****975** proceeded it developed into a wide-ranging inquisition into this man's educational, social, and political beliefs, encompassing even a question as to whether he was "a religious man."

----- Footnotes -----

n5 "Mr. ARMSTRONG [the departmental security officer, inquiring about petitioner's activities as a teacher in a Georgia college]: Were these activities designed to be put into effect by both the white and the colored races? . . . What were your feelings at that time concerning race equality? . . . How about civil rights? Did that enter into a discussion in your seminar groups?"

"Mr. ARMSTRONG: Do I interpret your statement correctly that maybe Negroes and Jews are denied some of their constitutional rights at present?

"Mr. VITARELLI: Yes.

"Mr. ARMSTRONG: In what way?

"Mr. VITARELLI: I saw it in the South where certain jobs were open to white people and not open to Negroes because they were Negroes. . . . In our own university, there was a quota at Columbia College for the medical students. Because they were Jewish, they would permit only so many. I thought that was wrong.

"Chairman TOWSON: Doctor, isn't it also true that Columbia College had quotas by states and other classifications as well?

"Mr. VITARELLI: I don't remember that. It may be true.

"Mr. ARMSTRONG: In other words, wasn't there a quota on Gentiles as well as Jews?

"Mr. VITARELLI: . . . I had remembered that some Jews seemed to feel, and I felt, too, at the time, that they were being persecuted somewhat.

"Chairman TOWSON: Did you ever take the trouble to investigate whether or not they were or did you just accept their word?

"Mr. VITARELLI: No, I didn't investigate it.

"Chairman TOWSON: You accepted their word for it.

"Mr. VITARELLI: I accepted the general opinion of the group of professors with whom I associated and was taught. . . .

"Chairman TOWSON: I am simply asking you to verify the vague impression I have that Columbia College puts a severe quota on residents of New York City, whatever their race, creed or color may be.

"Mr. VITARELLI: I think that is true. . . .

"Chairman TOWSON: Otherwise there would be no students at Columbia College except residents of New York City.

"Mr. VITARELLI: There may be a few others, but mostly New York City.

"Chairman TOWSON: Isn't it true that the quota system is designed by the college in order to make it available to persons other than live in New York City?

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"Mr. VITARELLI: I believe that is the reason.

"Chairman TOWSON: And any exclusion of a resident of New York City would be for that reason, rather than the race, creed or color?

"Mr. VITARELLI: I think that is the way the policy is stated.

"Chairman TOWSON: Is it not a fact?

"Mr. VITARELLI: I don't think so. . . .

"Chairman TOWSON: Excuse me, Mr. Armstrong.

"Mr. ARMSTRONG: I went to Columbia Law School for two years and certainly there was not any quota system there at that time, and that is a long time ago. All right, we are getting afield."

Petitioner was also asked the following questions by the security officer during the course of the hearing:

"Mr. ARMSTRONG: I think you indicated in an answer or a reply to an interrogatory that you at times voted for and sponsored the principles of Franklin Delano Roosevelt, Norman A. Thomas, and Henry Wallace? . . . How many times did you vote for . . . [Thomas] if you care to say? . . . How about Henry Wallace? . . . How about Norman Thomas? Did his platform coincide more nearly with your ideas of democracy? . . . At one time, or two, you were a strong advocate of the United Nations. Are you still? . . . The file indicates, too, that you were quite hepped up over the one world idea at one time; is that right?"

Witnesses presented by petitioner were asked by the security officer and board members such questions as:

"The Doctor indicated that he was acquainted with and talked to Norman Thomas on occasions. Did you know about that? . . . How about Dr. Vitarelli? Is he scholarly? . . . A good administrator? . . . Was he careless with his language around the students or careful? . . . Did you consider Dr. Vitarelli as a religious man? . . . Was he an extremist on equality of races? . . . In connection with the activities that Dr. Vitarelli worked on that you know about, either in the form of projects or in connection with the educational activities that you have mentioned, did they extend to the Negro population of the country? In other words, were they contacts with Negro groups, with Negro instructors, with Negro students, and so on?"

It is not apparent how any of the above matters could be material to a consideration of the question whether petitioner's retention in government service would be consistent with national security.

- - - - - End Footnotes - - - - -

[*544]

***HR7] [7]

HN5⁷ Third, § 21 (c)(4) gives the employee the right "to cross-examine any witness offered in support of the charges." It is apparent from an over-all reading of the regulations that it was not contemplated that this provision should require the Department to call witnesses to testify in support of any or all of the charges, because it was expected that charges might rest on information gathered from or by "confidential informants." We think, however, that § 21 (c)(4) did contemplate the calling by the Department of any informant not properly classifiable as "confidential," if information furnished by that informant was to be used by the board in assessing an employee's status. n6 The transcript shows that this [*545] provision was violated on at ***1020] least one occasion at petitioner's hearing, for the security officer identified by name a person who had given information apparently considered detrimental to petitioner, thus negating any possible inference that that person was considered a "confidential informant" whose identity it was necessary to keep secret, and questioned petitioner at some length concerning the information supplied from this source without calling the informant and affording petitioner the right to cross-examine. n7

- - - - - Footnotes - - - - -

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n6 This reading of the provision is supported by ^{HN677}§ 21 (e) of the Order, which provides in part that "if the employee is or may be handicapped by the nondisclosure to him of confidential information or by lack of opportunity to cross-examine confidential informants, the hearing board shall take that fact into consideration," thus implying that the employee is to have the right to cross-examine nonconfidential informants who provide material taken into consideration by the board.

n7 The information was to the effect that petitioner had criticized as "bourgeois" the purchase of a house by a woman associate in Georgia. Petitioner flatly denied that he had made the remark attributed to him, and said that he could never have made such a statement except in a spirit of levity.

----- End Footnotes----- *****HR8** [8]

Because the proceedings attendant upon petitioner's dismissal from government service on grounds of national security fell substantially short of the requirements of the applicable departmental regulations, we hold that such dismissal was illegal and of no effect.

*****HR9** [9]

Respondent urges that even if the dismissal of September 10, 1954, was invalid, petitioner is not entitled to reinstatement by reason of the fact that ****976** he was at all events validly dismissed in October 1956, when a copy of the second "Notification of Personnel Action," omitting all reference to any statute, order, or regulation relating to security discharges, was delivered to him. Granting that the Secretary could at any time after September 10, 1954, have validly dismissed petitioner without any statement of reasons, and independently of the proceedings taken against him under Order No. 2738, we cannot view the delivery of the new notification to petitioner as an exercise of that summary dismissal power. Rather, the fact that it was dated "9-21-54," contained a termination of employment date of "9-10-54," was designated as "a revision" of the 1954 notification, and was evidently filed in ***546** the District Court before its delivery to petitioner indicates that its sole purpose was an attempt to moot petitioner's suit in the District Court by an "expunging" of the grounds for the dismissal which brought Order No. 2738 into play. n8 In these circumstances, we would not be justified in now treating the 1956 action, plainly intended by the Secretary as a grant of relief to petitioner in connection with the form of the 1954 discharge, as an exercise of the Secretary's summary removal power as of the date of its delivery to petitioner. n9

----- Footnotes -----

n8 The Secretary successfully took the position in the courts below that the only possible defect in the 1954 discharge was the articulation of the "national security" grounds therefor, and that since that defect did not void the dismissal as such, an "expunging" of these grounds gave petitioner the maximum relief to which he could possibly be entitled.

n9 Respondent's brief in this Court refers to the 1956 notice as part of "corrective administrative action which has been taken," and as "relief voluntarily accorded [petitioner]." The premise upon which the dissenting opinion essentially rests -- that the 1956 action was an attempt "to discharge Vitarelli retroactively" -- thus is contrary to the Secretary's own position as to the reason for that action.

----- End Footnotes-----

*****HR10** [10]

It follows from what we have said that petitioner is entitled to *****1021** the reinstatement which he seeks, subject, of course to any lawful exercise of the Secretary's authority hereafter to dismiss him from employment in the Department of the Interior.

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CONCURBY: FRANKFURTER (In Part)

DISSENTBY: FRANKFURTER (In Part)

DISSENT: MR. JUSTICE FRANKFURTER, whom MR. JUSTICE CLARK, MR. JUSTICE WHITTAKER and MR. JUSTICE STEWART join, concurring in part and dissenting in part.

[*HR11]** [11]

An executive agency must be rigorously held to the standards by which it professes its action to be judged. See *Securities & Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80, 87-88. Accordingly, if dismissal from **[*547]** employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. See *Service v. Dulles*, 354 U.S. 363. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword. Therefore, I unreservedly join in the Court's main conclusion, that the attempted dismissal of Vitarelli in September 1954 was abortive and of no validity because the procedure under Department of the Interior Order No. 2738 was invoked but not observed.

But when an executive agency draws on the freedom that the law vests in it, the judiciary cannot deny or curtail such freedom. The Secretary of the Interior concededly had untrammelled right to dismiss Vitarelli out of hand, since he had no protected employment rights. He could do so as freely as a private employer who is not bound by procedural restrictions of a collective bargaining contract. The Secretary was under no

[977]** law-imposed or self-imposed restriction in discharging an employee in Vitarelli's position without statement of reasons and without a hearing. And so the question is, did the Secretary take action, after the abortive discharge in 1954, dismissing Vitarelli?

In October 1956 there was served upon Vitarelli a copy of a new notice of dismissal which had been inserted in the Department's personnel records in place of the first notice. Another copy was filed with the District Court in this proceeding. This second notice contained no mention of grounds of discharge. If, instead of sending this second notice to Vitarelli, the Secretary had telephoned Vitarelli to convey the contents of the second notice, he would have said: "I note that you are contesting the validity of the dismissal. I want to make this very clear to you. If I did not succeed in dismissing you before, **[*548]** I now dismiss you, and I dismiss you retroactively, effective September 1954."

The Court disallows this significance to the second notice of discharge because it finds controlling meaning in the suggestion of the Government that the expunging from the record of any adverse comment, and the second notice of discharge, signified a reassertion of the effectiveness of the first attempt at dismissal. And so, the Court concludes, no intention of severance from service in 1956 could legally be found since the Secretary expressed no doubt that the first dismissal had been effective. But this **[***1022]** document of 1956 was not a mere piece of paper in a dialectic. The paper was a record of a process, a manifestation of purpose and action. The intendment of the second notice, to be sure, was to discharge Vitarelli retroactively, resting this attempted dismissal on valid authority -- the summary power to dismiss without reason. Though the second notice could not pre-date the summary discharge because the Secretary rested his 1954 discharge on an unsustainable ground, and Vitarelli could not be deprived of rights accrued during two years of unlawful discharge, the prior wrongful action did not deprive the Secretary of the power in him to fire Vitarelli prospectively. And if the intent of the Secretary be manifested in fact by what he did, however that intent be expressed -- here, the intent to be rid of Vitarelli -- the Court should not frustrate the Secretary's rightful exercise of this power as of October 1956. The fact that he wished to accomplish more does not mean he accomplished nothing.

To construe the second notice to mean administratively nothing is to attribute to the Secretary the purpose of a mere diarist, the corrector of entries in the Department's archives. This wholly disregards the actualities in the conduct of a Department concerned with terminating the services of an undesired employee as completely and by **[*549]** whatever means that may legally be accomplished. If an employer summons before him an employee over whom he has unfettered power of dismissal and says to him: "You are no longer employed here because I fired you last week," can one reasonably escape the conclusion that though the employer was in error and had not effectively carried out his purpose to fire the employee last week, the employer's statement clearly manifests a present belief that the employee is dismissed and an intention that he be so dismissed? Certainly the employee would have no doubt his employment was now at an

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end. Of course if some special formal document were required to bring about a severance of a relationship, cf. *Felter v. Southern Pacific Co.*, 359 U.S. 326, because of non-compliance with the formality the severance would not come into being. But no such formality was requisite to Vitarelli's dismissal.

This is the common sense of it: In 1956 the Secretary said to Vitarelli: "This document tells you without any ifs, ands, or buts, you have been fired right along and of course that means you are not presently employed by this Department. **[**978]** " Since he had not been fired successfully in 1954, the Court concludes he must still be employed. I cannot join in an unreal interpretation which attributes to governmental action the empty meaning of confetti throwing.

REFERENCES: ♦ [Return To Full Text Opinion](#)

Annotation References:

Supreme Court decisions involving loyalty investigations, 95 L ed 877 and 100 L ed 663.

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*347 U.S. 260, *; 74 S. Ct. 499, **;
98 L. Ed. 681, ***; 1954 U.S. LEXIS 2334*

UNITED STATES EX REL. ACCARDI v. SHAUGHNESSY, DISTRICT DIRECTOR OF THE
IMMIGRATION AND NATURALIZATION SERVICE

No. 366

SUPREME COURT OF THE UNITED STATES

347 U.S. 260; 74 S. Ct. 499; 98 L. Ed. 681; 1954 U.S. LEXIS 2334

February 2, 1954, Argued
March 15, 1954, Decided

PRIOR HISTORY:

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner's application for a writ of habeas corpus was denied by the District Court. The Court of Appeals affirmed. 206 F.2d 897. This Court granted certiorari. 346 U.S. 884. Reversed, p. 268.

DISPOSITION: 206 F.2d 897, reversed.

CASE SUMMARY

PROCEDURAL POSTURE: Certiorari was granted to the United States Court of Appeals for the Second Circuit, which denied petitioner's application for a writ of habeas corpus that petitioner sought in order to attack the validity of the denial of his application for suspension of deportation under section 19(c) of the Immigration Act, 8 U.S.C.S. § 155 (c).


OVERVIEW: Petitioner was to be deported. Petitioner claimed that right before the Board of Immigration Appeals' (Board) decision, the Attorney General issued a list of unsavory characters with petitioner's name on the list that the Attorney General wished to have deported. Petitioner claimed the list was circulated among all the employees in the Immigration Service and on the Board and that circulation of the list made fair consideration of petitioner's case impossible. The U.S. Supreme Court reversed. If true, the allegations showed that the Board's discretion in determining petitioner's case was compromised by the Attorney General, as it was clear in the allegations that the Attorney General wanted the people on his list deported. Petitioner was thus entitled to a hearing before the district court in order to try and prove his allegation that the Attorney General prevented the Board from exercising its discretion. If successful, petitioner would be entitled to a hearing before the Board on the matter of suspension of deportation. If the Board were to hear petitioner's application for suspension, it would have to rule out consideration of the Attorney General's list.


OUTCOME: The Supreme Court reversed the appellate court's decision, finding petitioner was entitled to a hearing to try and prove his allegations about the Attorney General's list because the Board of Immigration of Appeals was supposed to use its own discretion in hearing petitioner's case, and if the allegations were true, it was likely that the Board's


discretion was compromised by the Attorney General's list.


CORE TERMS: deportation, regulation, suspension, alien, habeas corpus, immigration, confidential, discretionary, Immigration Act, suspend, deportable, Nationality Act, unsavory, issuance, reviewable, deported, fair consideration, force and effect, hearing officer, own discretion, prejudgment, circulated, announced, revision, deport, subject to judicial review, specifically provided, ineligible, questioned, suspended



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[Immigration Law](#) > [Deportation & Removal](#) > [Relief](#) > [Relief Generally](#) 
HN1 ⚡ See 66 Stat. 280.


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HN2 ⚡ See 8 U.S.C.S. § 155(c).


[Immigration Law](#) > [Deportation & Removal](#) > [Grounds](#) > [Inadmissibility at Entry](#) 
HN3 ⚡ See 8 U.S.C.S. § 214.

[Immigration Law](#) > [Deportation & Removal](#) > [Grounds](#) > [Inadmissibility at Entry](#) 
HN4 ⚡ The ground for deportation found in 8 U.S.C.S. § 214 is perpetuated by § 241 (a) (1) and (2) of the Immigration and Nationality Act of 1952, 8 U.S.C.S. § 1251 (a) (1) and (2). [More Like This Headnote](#)

[Civil Procedure](#) > [Preclusion & Effect of Judgments](#) > [Res Judicata](#) 
[Immigration Law](#) > [Judicial Review](#) > [Habeas Corpus](#) 
HN5 ⚡ Res judicata does not apply to proceedings for habeas corpus. [More Like This Headnote](#)

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HN6 ⚡ Regulations with the force and effect of law supplement the bare bones of 8 U.S.C.S. § 155(c). The regulations prescribe the procedure to be followed in processing an alien's application for suspension of deportation. Until the 1952 revision of the regulations, the procedure called for decisions at three separate administrative levels below the Attorney General, hearing officer, Commissioner, and the Board of Immigration Appeals. [More Like This Headnote](#)

[Immigration Law](#) > [Deportation & Removal](#) > [Relief](#) > [Relief Generally](#) 
HN7 ⚡ The Board of Immigration Appeals is appointed by the Attorney General, serves at his pleasure, and operates under regulations providing that: In considering and determining appeals, the Board of Immigration Appeals shall exercise such discretion and power conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case. The decision of the Board shall be final except in those cases reviewed by the Attorney General. And the Board is required to refer to the Attorney General for review all cases which: (a) the Attorney General directs the Board to refer to him; (b) the chairman or a majority of the Board believes should be referred to the Attorney General for review of its decision; (c) the Commissioner requests be referred to the Attorney General by the Board and it agrees. [More Like This Headnote](#)

[Immigration Law](#) > [Deportation & Removal](#) > [Administrative Proceedings](#) > [Administrative Appeals](#) 
HN8 ⚡ If the word "discretion" means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience. This applies with equal force to the Board of

Immigration Appeals and the Attorney General. In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner. [More Like This Headnote](#)

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SYLLABUS: By a habeas corpus proceeding in a federal district court, petitioner challenged the validity of the denial of his application for suspension of deportation under the provisions of § 19 (c) of the Immigration Act of 1917. Admittedly deportable, petitioner alleged, *inter alia*, that the denial of his application by the Board of Immigration Appeals was prejudged through the issuance by the Attorney General in 1952, prior to the Board's decision, of a confidential list of "unsavory characters" including petitioner's name, which made it impossible for petitioner "to secure fair consideration of his case." Regulations promulgated by the Attorney General and having the force and effect of law delegated the Attorney General's discretionary power under § 19 (c) in such cases to the Board and required the Board to exercise its own discretion when considering appeals. *Held:* Petitioner is entitled to an opportunity in the district court to prove the allegation; and, if he does prove it, he should receive a new hearing before the Board without the burden of previous proscription by the list. Pp. 261-268.

(a) As long as the Attorney General's administrative regulation conferring "discretion" on the Board remains operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any *manner*. Pp. 265-267.

(b) The allegations of the habeas corpus petition in this case were sufficient to charge the Attorney General with dictating the Board's decision. Pp. 267-268.

(c) This Court is not here reviewing and reversing the *manner* in which discretion was exercised by the Board, but rather regards as error the Board's alleged *failure to exercise* its own discretion, contrary to existing valid regulations. P. 268.

(d) Petitioner's application for suspension of deportation having been made in 1948, this proceeding is governed by § 19 (c) of the 1917 Act rather than by the Immigration and Nationality Act of 1952. P. 261, n. 1.

(e) The doctrine of *res judicata* is inapplicable to habeas corpus proceedings. P. 263, n. 4.

COUNSEL: Jack Wasserman argued the cause and filed a brief for petitioner.

Marvin E. Frankel argued the cause for respondent. With him on the brief were Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg and Robert G. Maysack.

JUDGES: Warren, Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark, Minton

OPINIONBY: CLARK

OPINION: [*261] [**500] [***683] MR. JUSTICE CLARK delivered the opinion of the Court.

This is a habeas corpus action in which the petitioner attacks the validity of the denial of his application for suspension of deportation under the provisions of § 19 (c) of the Immigration Act of 1917. n1 Admittedly [***684] deportable, [*262] the petitioner alleged, among other things, that the denial of his application by the Board of Immigration Appeals was prejudged through the issuance by the Attorney General in 1952, prior to the Board's

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decision, of a confidential list of "unsavory characters" including petitioner's name, which made it impossible for him "to secure fair consideration of his case. " The District Judge refused the offer of proof, denying the writ on the allegations of the petitioner without written opinion. A divided panel of the Court of Appeals for the Second Circuit affirmed. 206 F.2d 897. We granted certiorari. 346 U.S. 884.

[1]

----- Footnotes -----

n1 39 Stat. 889, as amended, 8 U. S. C. (1946 ed., Supp. V) § 155 (c). Section 405 is the savings clause of the Immigration and Nationality Act of 1952 and its subsection (a) provides that:

HN1 "Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any . . . proceeding which shall be valid at the time this Act shall take effect; or to affect any . . . proceedings . . . brought . . . at the time this Act shall take effect; but as to all such . . . proceedings, . . . the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. . . . An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, . . . which is pending on the date of enactment of this Act [June 27, 1952], shall be regarded as a proceeding within the meaning of this subsection." 66 Stat. 280, 8 U. S. C. (1952 ed.), p. 734.

Since Accardi's application for suspension of deportation was made in 1948, § 19 (c) of the 1917 Act continues to govern this proceeding rather than its more stringent equivalent in the 1952 Act, § 244, 66 Stat. 214, 8 U. S. C. (1952 ed.) § 1254.

----- End Footnotes -----

The Justice Department's immigration file on petitioner reveals the following relevant facts. He was born in Italy of Italian parents in 1909 and **[**501]** entered the United States by train from Canada in 1932 without immigration inspection and without an immigration visa. This entry clearly falls under § 14 of the Immigration Act of 1924 n2 and is the uncontested ground for deportation. The deportation proceedings against him began in 1947. In 1948 he applied for suspension of deportation pursuant to § 19 (c) of the Immigration Act of 1917. This section as amended in 1948 provides, in pertinent part, that:

HN2 "In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may . . . suspend deportation of such alien if he is not ineligible **[*263]** for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon July 1, 1948." 8 U. S. C. (1946 ed., Supp. V) § 155 (c).

----- Footnotes -----

n2 ^{HN3} "Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States . . . shall be taken into custody and deported in the same manner as provided for in sections 19 and 20 of the Immigration Act of 1917" 43 Stat. 162, 8 U. S. C. (1946 ed.) § 214. ^{HN4} This ground for deportation is perpetuated by § 241 (a)(1) and (2) of the Immigration and Nationality Act of 1952. 66 Stat. 204, 8 U. S. C. (1952 ed.) § 1251 (a)(1) and (2).

----- End Footnotes -----

Hearings on the deportation charge and the application for suspension of deportation were held before officers of the Immigration and Naturalization Service at various times from 1948 to 1952. A hearing officer ultimately found petitioner deportable and recommended a denial of discretionary relief. On July 7, 1952, the Acting Commissioner of Immigration adopted the officer's findings and recommendation. Almost nine months later, on April 3, 1953, the Board of Immigration Appeals affirmed the decision of the hearing officer. A warrant of deportation was issued the same day and arrangements were made for actual deportation to take place on April 24, 1953.

The scene of action then shifted to the United States District Court for the Southern District of New York. One day before his scheduled deportation petitioner sued out a writ of habeas corpus. District Judge Noonan dismissed the writ on April 30 and his order, formally entered **[***685]** on May 5, was never appealed. Arrangements were then made for petitioner to depart on May 19. n3 However, on May 15, his wife commenced this action by filing a petition for a second writ of habeas corpus. n4 New **[*264]** grounds were alleged, on information and belief, for attacking the administrative refusal to suspend deportation. n5 The principal ground is that on October 2, 1952 -- after the Acting Commissioner's decision in the case but before **[**502]** the decision of the Board of Immigration Appeals -- the Attorney General announced at a press conference that he planned to deport certain "unsavory characters"; on or about that date the Attorney General prepared a confidential list of one hundred individuals, including petitioner, whose deportation he wished; the list was circulated by the Department of Justice among all employees in the Immigration Service and on the Board of Immigration Appeals; and that issuance of the list and related publicity amounted to public prejudgment by the Attorney General so that fair consideration of petitioner's case by the Board of Immigration Appeals was made impossible. Although an opposing affidavit submitted by government counsel denied "that the decision was based on information outside of the record" and contended that the allegation of prejudgment was "frivolous," the same counsel repeated in a colloquy with the **[*265]** court a statement he had made at the first habeas corpus hearing -- "that this man was on the Attorney General's proscribed list of alien deportees."

----- Footnotes -----

n3 Meanwhile, Accardi moved the Board of Immigration Appeals to reconsider his case. The motion was denied on May 8.

[2]

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n4 ^{HN5}✦ *Res judicata* does not apply to proceedings for habeas corpus. *Salinger v. Loisel*, 265 U.S. 224 (1924); *Wong Doo v. United States*, 265 U.S. 239 (1924).

n5 The first ground was that "in all similar cases the Board of Immigration Appeals has exercised favorable discretion and its refusal to do so herein constitutes an abuse of discretion." This is a wholly frivolous contention, adequately disposed of by the Court of Appeals. 206 F.2d 897, 901. Another allegation charged "that the Department of Justice maintains a confidential file with respect to [Joseph Accardi]." But at no place does the petition elaborate on this charge, nor does the petition allege that discretionary relief was denied because of information contained in a confidential file. Although the petition does allege that "because of consideration of matters outside the record of his immigration hearing, discretionary relief has been denied," this allegation seems to refer to the "confidential list" discussed in the body of the opinion. Hence we assume that the charge of reliance on confidential information merely repeats the principal allegation that the Attorney General's prejudgment of Accardi's case by issuance of the "confidential list" caused the Board to deny discretionary relief.

- - - - - End Footnotes - - - - -

District Judge Clancy did not order a hearing on the allegations and summarily refused to issue a writ of habeas corpus. An appeal was taken to the Court of Appeals for the Second Circuit with the contention that the allegations required a hearing in the District Court and that the writ should have been issued if the allegations were proved. A majority of the Court of Appeals' panel thought the administrative record amply supported a refusal to suspend deportation; found nothing in the record to indicate that the administrative officials considered anything but that record in arriving at a decision in the case; and ruled that the assertion of mere "suspicion and belief" that extraneous matters were considered does not require a hearing. Judge Frank dissented.

[*HR3] [3]**

The same questions presented to the Court of Appeals were raised in the petition for certiorari and are thus properly before us. The crucial question is whether the alleged conduct of the Attorney General deprived petitioner of any of the rights guaranteed him by the statute **[***686]** or by the regulations issued pursuant thereto.

[*HR4] [4]**

^{HN6}✦ Regulations n6 with the force and effect of law n7 supplement the bare bones of § 19 (c). The regulations prescribe the procedure to be followed in processing an alien's application for suspension of deportation. Until **[*266]** the 1952 revision of the regulations, the procedure called for decisions at three separate administrative levels below the Attorney General -- hearing officer, Commissioner, and the Board of Immigration Appeals. ^{HN7}✦ The Board is appointed by the Attorney **[*503]** General, serves at his pleasure, and operates under regulations providing that: "In considering and determining . . . appeals, the Board of Immigration Appeals shall exercise such discretion and power conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case. The decision of the Board . . . shall be final except in those cases reviewed by the Attorney General" 8 CFR, 1949, § 90.3 (c). See 8 CFR, Rev. 1952, § 6.1 (d)(1). And the Board was required to refer to the Attorney General for review all cases which:

"(a) The Attorney General directs the Board to refer to him.

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"(b) The chairman or a majority of the Board believes should be referred to the Attorney General for review of its decision.

"(c) The Commissioner requests be referred to the Attorney General by the Board and it agrees." 8 CFR, 1949, § 90.12. See 8 CFR, Rev. 1952, § 6.1 (h)(1).

- - - - - Footnotes - - - - -

n6 The applicable regulations in effect during most of this proceeding appear at 8 CFR, 1949, Pts. 150 and 90 and 8 CFR, 1951 Pocket Supp., Pts. 150, 151 and 90. The corresponding sections in the 1952 revision of the regulations, promulgated pursuant to the Immigration and Nationality Act of 1952, may be found at 8 CFR, Rev. 1952, Pts. 242-244 and 6; 8 CFR, 1954 Pocket Supp., Pts. 242-244 and 6; 19 Fed. Reg. 930.

n7 See *Boske v. Comingore*, 177 U.S. 459 (1900); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 155 (1923); *Bridges v. Wixon*, 326 U.S. 135, 150-156 (1945).

- - - - - End Footnotes - - - - -

[***HR5] [5]

[***HR6] [6]

The regulations just quoted pinpoint the decisive fact in this case: the Board was required, as it still is, to exercise its own judgment when considering appeals. The clear import of broad provisions for a final review by the Attorney General himself would be meaningless if the Board were not expected to render a decision in accord with its own collective belief. In unequivocal terms the regulations delegate to the Board discretionary authority as broad as the statute confers on the Attorney General; the scope of the Attorney General's discretion became the yardstick of the Board's. And ^{HNS} if the word "discretion" [*267] means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience. This applies with equal force to the Board and the Attorney General. In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner.

[***HR7] [7]

We think the petition for habeas corpus charges the Attorney General with precisely what the regulations forbid him to do: dictating the Board's decision. The petition alleges that the Attorney General included the name of petitioner in a confidential list of "unsavory characters" whom he wanted deported; public announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation; to the contrary, those listed were persons whom the Attorney General "planned to deport." And, [***687] it is alleged, this intention was made quite clear to the Board when the list was circulated among its members. In fact, the Assistant District Attorney characterized it as the "Attorney General's proscribed list of alien deportees." To be sure, the petition does not allege that the "Attorney General ordered the Board to deny discretionary relief to the listed aliens." It would be naive to expect such a heavy-handed way of doing things. However, proof was offered and refused that the Commissioner of Immigration told previous counsel of petitioner, "We can't do a thing in your case because the Attorney General has his [petitioner's] name on that list of a hundred." We believe the allegations are

RE B

From: JTF/JDOG Badging office, McCalla hangar.

Subject: New office hours as of 13 August 2004

Monday: 0800-1600

Tuesday: 0800-1600

Wednesday: 0800-1500

Thursday: 0800-1500

Friday: 0800-1500

Saturday: 1300-Completion of incoming rotator.

Sunday: Closed

Questions or comments should be addressed to
SSG Schultz@5425

UNITED STATES OF AMERICA

v.

HAMDAN

PROSECUTION RESPONSE TO
DEFENSE MOTION FOR
DISMISSAL (FAILURE TO
ACCORD THE ACCUSED A
STATUS REVIEW HEARING
BEFOR MILITARY
COMMISSION)

23 AUGUST 2004

1. Timeliness: This Motion is filed in a timely manner as required by POM 4.
2. Position on Motion: The Prosecution submits that the Defense's Motion should be denied in total.
3. Facts Agreed upon by the Prosecution: The Prosecution admits the facts alleged by the Defense in subparagraphs 4 (a-g) and (i) for the purposes of this motion.¹
4. Facts:
 - a. The Prosecution denies the facts as alleged by the defense in subparagraph 4(f).
 - b. On 13 July 2004, Mr. Hamdan was notified of his opportunity to contest designation as an enemy combatant in front of the Combatant Status Review Tribunal (hereinafter "CSRT"). See Affidavit of Mr. Kelly Harrison (attached).
 - c. The Prosecution in the present case filed a Motion for Docketing on 27 July 2004 requesting a trial date of 7 December 2004.
 - d. In response to that filing, the Defense counsel stated that he would be prepared to begin trial on 11 December 2004. The Prosecution did not object to that date.
 - e. Mr. Hamdan's hearing in front of the CSRT is currently scheduled for 3 December 2004 and would be completed prior to an 11 December 2004 trial date. See Affidavit of Mr. Kelly Harrison (attached).

¹ Although not technically a factual disagreement, we note for the record that the conversation held between the lead Prosecutor and the Defense on 5 August 2004 revealed that an incorrect copy of the charge sheet had been served on the Defense. On 6 August 2004, LCDR Swift was provided the corrected charge sheet in Arabic and, in writing, accepted the responsibility to serve it on Mr. Hamdan.

f. The United States government did file a Notice of Motion in Mr. Hamdan's habeas case, as alleged by the Defense, but there was no promise made to Mr. Hamdan regarding his CSRT date.

g. The Government simply stated that both the Prosecution and the Defense had agreed upon a trial date in December and that Mr. Hamdan was scheduled to appear before the commission on preliminary matters on 23 August 2004. A footnote appended to that statement reads, "Before his *trial*, Hamdan will have the opportunity to challenge his status as an enemy combatant before a Combatant Status Review Tribunal." (emphasis added).

5. Legal Authority Cited:

a. July 7, 2004 Order Establishing Combatant Status Review Tribunal, available at www.defenselink.mil/news/jul/2004/d20040707review.pdf.

b. July 29, 2004 Memorandum For Distribution, Subject: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained [sic] at Guantanamo Bay Naval Base, Cuba (copy provided).

6. Discussion:

The Defense has framed the issue in this motion as:

... whether the government, after instituting regulations for a Combatant Status Review Hearing and promising a Federal District Court that Mr. Hamdan would receive such a hearing prior to the commencement of trial before a Military Commission, may lawfully disregard their regulations and promises and proceed to trial before Military Commissions in the absence of a Combatant Status Review Hearing.

See Defense Motion For Dismissal Of Charges For Failure To Accord The Accused A Status Review Hearing Before Military Commission, paragraph 5.

The Prosecution's first objection to the Defense Motion is that the suggested issue alleges the existence of a promise that was never made. Defense attached a portion of a motion in Mr. Hamdan's habeas case to substantiate his allegation that a promise was made. On 6 August 2004, the U.S. Attorney for the Western District of Washington did submit a Notice of Motion and Cross-Motion to Dismiss in the case of Swift v. Rumsfeld, (hereinafter "Habeas Motion") (attached). In the government's statement of facts, reciting the procedural posture of Mr. Hamdan's case at Military Commissions, they accurately state that "Both the government and Hamdan have proposed that his Commission *trial* begin in December. Hamdan is scheduled to appear before the Commission on August 23, 2004, *for preliminary matters*." See Habeas Motion at 12

and 13 (emphasis added). The second sentence in the quote was footnoted. The footnote reads: "Before his *trial*, Hamdan will have the opportunity to challenge his status as an enemy combatant before a Combatant Status Review Tribunal." See Habeas Motion at 13 (emphasis added). The Defense alleges that this language constitutes a binding promise by the U.S. government. This cannot be the case. The government was simply stating what they believed was the procedural posture at the time. There is no authority anywhere for the proposition that one government agency's statement of facts in a pleading constitutes a binding promise on a wholly separate agency in a wholly separate proceeding. The truth is the Defense cannot point to such a "promise."

Also, because the emphasized versions of the above quotations clearly demonstrate that the government in the Habeas Motion distinguished between a "trial" on one hand, and "preliminary matters" on the other, the government's statement also happened to be factually accurate. Given the Defense's current posture in the case before this Commission, the earliest possible trial date is 11 December. Therefore, Mr. Hamdan will most likely have his CSRT hearing prior to the beginning of trial. As such, the government's position in the Habeas Motion is neither a promise nor factually inaccurate or misleading. Therefore, the issue presented by the Defense, insofar as it pertains to an alleged promise by the U.S. government, is, at best, unripe and, at worst, misleadingly false.

Omitting the issue of promises, the question, as phrased by the defense, becomes whether the government, after instituting regulations for a Combatant Status Review Hearing, may lawfully disregard their regulations and proceed to trial before Military Commission in the absence of a Combatant Status Review Hearing. In this regard, the Prosecution notes and agrees that all the authority cited by the Defense stands for the proposition that a government agency is bound by its own regulations. However, the question of whether the Defense-cited caselaw has any applicability at this tribunal is moot, because no rule of either commission law or CSRT procedure has been violated.

The answer to Defense's issue would be a resounding negative if he could point to one place in commission law or in CSRT procedures and implementing instructions where the Tribunals and the Military Commissions were linked in any way or where time constraints in one system were related to those in another. The Defense does not do so in their Motion because they cannot. A comprehensive review of commission law does not reveal any obligation to have a CSRT hearing prior to the start of a commission trial. Similarly, a review of CSRT procedures yields precisely two time requirements. The first is a requirement that all detainees be served, within ten days of 7 July 2004, with the notice of their opportunity to appear at CSRT hearings. Mr. Hamdan received that notice on 13 July 2004, four days early. The second time requirement is that a detainees hearing be scheduled within thirty days of having a personal representative appointed. Mr. Hamdan's hearing is currently scheduled for 3 December 2004, so it is anticipated that his personal representative will be appointed at some time within the thirty days prior to 3 December. Neither of these rules even implies that a military commission could not commence if Mr. Hamdan's CSRT hearing did not occur before his military commission trial began. Thus, even if trial proceeded prior to Mr. Hamdan's CSRT hearing, the

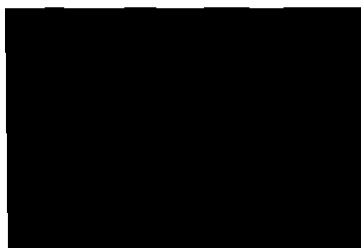
Defense's argument that the government has somehow violated its own regulations is incorrect.

Because Mr. Hamdan was never promised a CSRT hearing, because Mr. Hamdan's issue is not yet ripe, and because conducting Mr. Hamdan's trial before Military Commission prior to completion of a CSRT hearing is not prohibited by either commission law or CSRT procedure, the Defense's Motion to Dismiss should be denied.

7. Attachments: This response and its attachments will be personally served in hardcopy.

8. Oral Argument: Although the Prosecution does not specifically request oral argument, we are prepared to engage in oral argument if so required.

9. Witnesses: No witnesses will be needed to decide this motion.



Attachments:
As stated

AFFIDAVIT OF MR. [REDACTED]

I am a Special Agent assigned to the Criminal Investigation Task Force (CITF), Guantanamo Bay, Cuba. As part of my duties, I was assigned to look inquire into the status of detainee Hamdan's Combatant Status Review Tribunal (CSRT) process.

Upon receipt of the assignment, I contacted MA [REDACTED] at JDOG who pulled the record of service on Hamdan. I reviewed that record. I also spoke with [REDACTED] to discuss the scheduling of Hamdan's CSRT hearing.

Based on my inquiry, detainee Hamdan was provided notice of the CSRT proceedings on 13 July 2004. Also, Hamdan's CSRT hearing is currently scheduled for 3 December 2004.

This statement is true and accurate to the best of my

[REDACTED]
23 Aug 2004
Date

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Lieutenant Commander CHARLES SWIFT,
as next friend for SALIM AHMED
HAMDAN, Military Commission Detainee,
Camp Echo, Guantanamo Bay Naval Base,
Guantanamo, Cuba,

Petitioner,

v.

DONALD H. RUMSFELD, United States
Secretary of Defense; JOHN D.
ALTENBURG, Jr., Appointing Authority for
Military Commissions, Department of
Defense; Brigadier General THOMAS L.
HEMINGWAY, Legal Advisor to the
Appointing Authority for Military
Commissions; Brigadier General JAY HOOD,
Commander Joint Task Force, Guantanamo,
Camp Echo, Guantanamo Bay, Cuba;
GEORGE W. BUSH, President of the United
States,

Respondents.

NO. C04-0777RSL

**NOTICE OF MOTION AND
RESPONDENTS' CROSS-
MOTION TO DISMISS;
CONSOLIDATED RETURN TO
PETITION AND MEMORANDUM
OF LAW IN SUPPORT OF
CROSS-MOTION TO DISMISS**

(Note on Motion Calendar for:
September 3, 2004)

Respondents respectfully request, pursuant to Rule 12(b)(1) and (b)(6), of the Federal Rules of Civil Procedure, that this Court deny the petition for writ of mandamus or, in the alternative, writ of habeas corpus ("petition"), grant respondents' cross-motion to dismiss, and enter a judgment of dismissal in favor of respondents. This cross-motion is made and based on the accompanying memorandum, the pleadings and papers filed herein, and such oral

NOTICE OF MOTION AND RESPONDENTS' CROSS-MOTION TO DISMISS;
CONSOLIDATED RETURN TO PETITION AND MEMORANDUM OF LAW
IN SUPPORT OF CROSS-MOTION TO DISMISS - 1

1 argument as the Court may entertain.

2 DATED this 6th day of August, 2004.

3 Respectfully submitted,

4 JOHN McKAY
5 United States Attorney

6 DAVID B. SALMONS
7 JONATHAN L. MARCUS
8 Assistants to the Solicitor General
9 Office of the Solicitor General
10 U.S. Department of Justice

11 s/ Brian C. Kipnis
12 BRIAN C. KIPNIS
13 Assistant United States Attorney
14 601 Union Street, Suite 5100
15 Seattle, WA 98101-3903
16 Telephone: (206) 553-7970
17 Fax: (206) 553-0116
18 E-mail: brian.kipnis@usdoj.gov

19 Attorneys for Respondents

20
21
22 NOTICE OF MOTION AND RESPONDENTS' CROSS-MOTION TO DISMISS;
23 CONSOLIDATED RETURN TO PETITION AND MEMORANDUM OF LAW
24 IN SUPPORT OF CROSS-MOTION TO DISMISS - 2

25 (C04-0777RSL)

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Respondents, through undersigned counsel, oppose and hereby move to dismiss the
4 petition for writ of mandamus or habeas corpus ("petition") filed in this case.

5 The petition raises statutory, constitutional, and treaty-based challenges to the
6 President's authority to subject Salim Ahmed Hamdan to trial by military commission and to
7 confine him in connection with the commission proceedings. The petition also challenges the
8 President's authority to detain Hamdan as an enemy combatant and seeks Hamdan's release.

9 As explained in our Motion to Dismiss or Transfer dated July 16, 2004, this Court
10 lacks jurisdiction over the petition for two separate reasons. First, the petitioner, Charles
11 Swift, does not have standing to bring this action as a next friend to Hamdan, because Swift
12 has failed to show that Hamdan was unable to bring the action in his own name. Second, this
13 Court lacks jurisdiction under the habeas statute, because none of the respondents resides in
14 this District. Although petitioner has styled his petition as a request for a writ of mandamus
15 or, in the alternative, habeas corpus, his petition – which challenges the legality of his
16 custody pursuant to the military commission proceedings and the legality of his detention as an
17 enemy combatant – is the exclusive province of habeas corpus. Even if mandamus were an
18 appropriate vehicle in these circumstances, this Court would remain an improper forum,
19 because neither Hamdan, the real party in interest, nor Swift, the nominal party, resides in
20 this District.

21 In the event this Court declines to dismiss the petition for lack of jurisdiction or to
22 transfer the case to the District of Columbia, the Court should not consider the petition at this
23 time, because the military commission proceedings against Hamdan are ongoing. Indeed,
24 both the government and Hamdan have proposed that the trial begin in December. The law is
25 clear that the federal courts will not intercede in military process, but rather, will wait until
26 such process is complete before considering challenges to the jurisdiction of the Military
27 Commission.

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Petitioner's claims lack merit in any event. Military commissions have a long historical pedigree, and the Supreme Court has repeatedly approved their use for wartime trials of enemy combatants such as Hamdan. See Ex parte Quirin, 317 U.S. 1 (1942); Yamashita v. Styer, 327 U.S. 1 (1946). Petitioner's claims – regardless of how they are styled¹ – must therefore be dismissed.

STATEMENT OF FACTS

1. On September 11, 2001, the United States endured a foreign enemy attack more savage, deadly, and destructive than any sustained by the Nation on any one day in its history. That morning, agents of the al Qaida terrorist network hijacked four commercial airliners loaded with passengers and jet fuel and flew the planes as missiles towards targets in the Nation's financial center and its seat of government. Two of the planes struck the World Trade Center office towers in New York City just as the business day began, and a third hit the headquarters of the Department of Defense at the Pentagon. The fourth was brought down in Pennsylvania by its passengers before it could reach its target, presumed to be the United States Capitol or the White House. The September 11 attacks killed approximately 3,000 persons, exceeding the loss of life inflicted at Pearl Harbor. The attacks also caused injury to thousands more persons, destroyed hundreds of millions of dollars in property, and exacted a heavy toll on the Nation's infrastructure and economy.

The President, acting as Commander in Chief, took immediate action to defend the country and prevent additional attacks. Congress swiftly enacted its support of the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on

¹ "Mandamus relief is only available to compel an officer of the United States to perform a duty if (1) the plaintiff's claim is clear and certain; (2) the duty of the officer is ministerial and so plainly prescribed as to be free from doubt * * * ; and (3) no other adequate remedy is available." Fallini v. Hodel, 783 F.2d 1343, 1345 (9th Cir. 1986)." As we demonstrate below, none of petitioner's legal claims has any merit, so respondents have no duty to release Hamdan from custody pursuant to the military commission proceedings or from his confinement as an enemy combatant. Hamdan likewise is not entitled to a writ of habeas corpus, because he is not in custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3).

September 11, 2001." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF). Congress emphasized that the forces responsible for the September 11 attacks "continue to pose an unusual and extraordinary threat to the national security," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Ibid.

The President ordered the armed forces of the United States to Afghanistan to subdue the al Qaida terrorist network and the Taliban regime that supported it. In the course of those ongoing operations, United States and coalition forces have removed the Taliban from power, have eliminated the "primary source of support to the terrorists who viciously attacked our Nation on September 11, 2001," and have "seriously degraded" al Qaida's training capabilities. Office of the White House Press Secretary, Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Sept. 19, 2003) (< www.whitehouse.gov/news/releases/2003/09/20030919-1.html>). Al Qaida and the Taliban nonetheless remain a significant threat to United States and coalition forces. Moreover, Usama bin Laden has continued his call to al Qaida and its supporters to maintain their war against the United States, and the United States and other nations have been subject to attacks throughout the world. See, e.g., Tape urges Muslim fight against U.S. (Feb. 2, 2003) (< [www.cnn.com/2003/ ALLPOLITICS/02/11/powell.binladen/index.html](http://www.cnn.com/2003/ALLPOLITICS/02/11/powell.binladen/index.html)>). See also Qaeda Tapes Taunt U.S., France (Feb. 24, 2004) (< www.cbsnews.com/stories/2004/01/04/terror/main591217.shtml>).

2. In the context of both the removal of the Taliban from power and in the broader efforts to dismantle the al Qaida terrorist network and its supporters, the United States, consistent with the Nation's settled historical practice in times of war, has seized and detained numerous persons fighting for and associated with the enemy during the course of the ongoing military campaign. Individuals taken into U.S. control in connection with the ongoing hostilities undergo a multi-step screening process to determine if their detention is necessary. Only a small fraction of those captured in connection with the current conflict and subjected to

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1 the screening process have been designated for detention at Guantanamo. Upon their arrival
2 at Guantanamo, detainees are subject to an additional assessment by military commanders
3 regarding the need for their detention. The military is currently detaining approximately 600
4 aliens at Guantanamo.

5 3. Equally consistent with historical practice, the President has ordered the
6 establishment of military commissions to try a subset of those detainees for violations of the
7 laws of war and other applicable laws. In doing so, the President expressly relied on "the
8 authority vested in me * * * as Commander in Chief of the Armed Forces of the United States
9 by the Constitution and the laws of the United States of America, including the [AUMF] and
10 sections 821² and 836³ of title 10, United States Code." Detention, Treatment, and Trial of
11 Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001)
12 (hereinafter "Military Order").

13 The President made several findings that undergird the Military Order. He found,
14 inter alia, that "[i]nternational terrorists, including members of al Qaida, have carried out
15 attacks on United States diplomatic and military personnel and facilities abroad and on citizens
16

17 ² That section provides:

18 **Art. 21. Jurisdiction of courts-martial not exclusive**

19 The provisions of this chapter conferring jurisdiction upon courts-martial do not
20 deprive military commissions, provost courts, or other military tribunals of concurrent
21 jurisdiction with respect to offenders or offenses that by statute or by the law of war may be
22 tried by military commissions, provost courts, or other military tribunals.

23 ³ That section provides, in relevant part:

24 **Art. 36. President may prescribe rules**

25 (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases
26 arising under this chapter triable in courts-martial, military commissions and other military
27 tribunals, * * * may be prescribed by the President by regulations which shall, so far as he
28 considers practicable, apply the principles of law and the rules of evidence generally
recognized in the trial of criminal cases in the United States district courts, but which may not
be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as
practicable.

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1 and property within the United States on a scale that has created a state of armed conflict that
2 requires the use of the United States Armed Forces,” §1(a); that such terrorists “possess both
3 the capability and the intention to undertake further terrorist attacks against the United States
4 that, if not detected and prevented, will cause mass deaths, mass injuries, and massive
5 destruction of property, and may place at risk the continuity of the operations of the United
6 States Government,” § 1(c); that, in order “to protect the United States and its citizens, and
7 for the effective conduct of military operations and prevention of terrorist attacks, it is
8 necessary for individuals subject to” the Military Order to “be detained, and, when tried, * *
9 * be tried for violations of the laws of war and other applicable laws by military tribunals,” §
10 1(e); and that “[g]iven the danger to the safety of the United States and the nature of
11 international terrorism * * * it is not practicable to apply in military commissions under this
12 order the principles of law and the rules of evidence generally recognized in the trial of
13 criminal cases in the United States district courts,” § 1(f).

14 The Military Order applies to “any individual who is not a United States citizen with
15 respect to whom” the President makes two determinations “in writing”: first, that there is
16 “reason to believe that such individual” “(i) is or was a member of the organization known as
17 al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international
18 terrorism, or acts in preparation therefor, that have caused, threaten to cause or have as their
19 aim to cause, injury to or adverse effects on the United States, its citizens, national security,
20 foreign policy, or economy; or (iii) has knowingly harbored one or more individuals described
21 in” either of the other two categories; and second, “it is in the interest of the United States
22 that such individual be subject to this order.” Military Order § 2(a). The Order further
23 provides that any individual subject to the order “shall, when tried, be tried by military
24 commission for any and all offenses triable by military commission that such individual is
25 alleged to have committed, and may be punished in accordance with the penalties provided
26 under applicable law, including life imprisonment or death.” Id. § 4(a).

27 The Order authorizes the Secretary of Defense to issue orders and regulations
28

NOTICE OF MOTION AND RESPONDENTS' CROSS-MOTION TO DISMISS;
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(CD-04-0717RSL)

governing the Military Commissions, "which shall at a minimum provide for," among other things, "a full and fair trial, with the military commission sitting as the triers of both fact and law," id. § 4(c)(2); "admission of such evidence as would * * * have probative value to a reasonable person," id. § 4(c)(3); "conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present," id. § 4(c)(6); and "submission of the record of the trial, including any conviction or sentence, for review and final decision by" the President or the Secretary of Defense if so designated by the President," id. § 4(c)(8).

The Secretary of Defense, acting pursuant to the Military Order, established the Appointing Authority for Military Commissions.⁴ See Department of Defense Directive No. 5105.70, Feb. 10, 2004. The Appointing Authority has many responsibilities, including to appoint military commissions to try individuals subject to the Military Order; designate a judge advocate of any United States Armed Force to serve as a Presiding Officer over each military commission; approve and refer charges against such individuals; approve plea agreements; decide interlocutory questions certified by the Presiding Officer; ensure military commission proceedings are open to the maximum extent practicable; and order that investigative or other resources be made available to Defense Counsel and the Accused to the extent necessary for a full and fair trial. Id. § 4.

The military commissions that the Appointing Authority establishes have jurisdiction over individuals subject to the Military Order who are "alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority." Military Commission Order No. 1, 32 C.F.R. § 9.3(a) (2003). That charge must allege "violations of the laws of war" or "other offenses triable by military commission." Id. § 9.3(b). An individual so charged (the "Accused") is assigned defense counsel (one or more military officers who are judge advocates of any United States armed force) to conduct his defense

⁴ The Secretary designated John D. Altenburg, Jr., a respondent in this action, to serve as the Appointing Authority.

1 before the Commission. Id. § 9.4(c)(2). The Accused may choose to replace the detailed
2 defense counsel with another military officer who is a judge advocate, provided that such
3 officer is available. Id. § 9.4(c)(2)(iii)(A). The Accused may also retain a civilian attorney of
4 choice at no expense to the United States government, ibid., provided that such attorney meets
5 certain criteria, id. § 9.4(c)(2)(iii)(B).

6 Under the procedures the Secretary established for the commissions, the Accused must,
7 inter alia, (1) receive a copy of the charges in English and, if appropriate, in another language
8 that the Accused understands, “sufficiently in advance of trial to prepare a defense”; (2) be
9 presumed innocent until proven guilty; and (3) be found not guilty unless the offense is proved
10 beyond a reasonable doubt. Id. §§ 9.5(a), (b), (c). The prosecution must provide the defense
11 “with access to evidence [it] intends to introduce at trial” and to “evidence known to the
12 prosecution that tends to exculpate the Accused.” Id. § 9.5(e). The Accused is permitted but
13 not required to testify at trial, and the Commission may not draw an adverse inference from a
14 decision not to testify. Id. § 9.5(f). The Accused also “may obtain witnesses and documents
15 for [his] defense, to the extent necessary and reasonably available as determined by the
16 Presiding Officer,” id. § 9.5(h), and may present evidence at trial and cross-examine
17 prosecution witnesses, id. § 9.5(i). In addition, once a Commission’s finding on a charge
18 becomes final, “the Accused shall not again be tried” for that charge. Id. § 9.5(p).

19 The Secretary of Defense has directed the commissions to provide for a “full and fair
20 trial”; to “[p]roceed impartially and expeditiously”; and to “[h]old open proceedings except
21 where otherwise decided by the Appointing Authority or the Presiding Officer[.]” Id.
22 §§ 9.6(b)(1),(2),(3). Proceedings may be closed in order to (1) protect classified information;
23 (2) prevent unauthorized disclosure of protected information; (3) protect the physical safety of
24 participants, including witnesses; and (4) protect intelligence and law enforcement sources and
25 methods. Id. § 9.6(b)(3). In no circumstance, however, may the detailed defense counsel be
26 excluded from a proceeding, ibid., and in no circumstance may the Commission admit into
27 evidence information not presented to detailed defense counsel, id. § 9.6(d)(5)(ii)(C).

28
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1 Once a trial is completed (including sentencing in the event of a guilty verdict), the
2 Presiding Officer must "transmit the authenticated record of trial to the Appointing
3 Authority," id. at § 9.6(h)(1), which "shall promptly perform an administrative review of the
4 record of trial," id. § 9.6(h)(3). If the Appointing Authority determines that the commission
5 proceedings are "administratively complete," the Appointing Authority must transmit the
6 record of trial to the Review Panel, which consists of three military officers,⁵ at least one of
7 whom has experience as a judge. Id. 9.6(h)(4). The Review Panel must return the case to the
8 Appointing Authority for further proceedings when a majority of that panel "has formed a
9 definite and firm conviction that a material error of law occurred." Military Commission
10 Instruction No. 9, § 4(C)(1)(a). On the other hand, if a majority of the panel finds no such
11 error, it must forward the case to the Secretary with a written opinion recommending that (1)
12 each finding of guilt "be approved, disapproved, or changed to a finding of Guilty to a lesser-
13 included offense" and (2) the sentence imposed "be approved, mitigated, commuted, deferred,
14 or suspended." Id. § 4(C)(1)(b). "An authenticated finding of Not Guilty," however, "shall
15 not be changed to a finding of Guilty." 32 C.F.R. § 9.6(h)(2).

16 The Secretary must review the trial record and the Review Panel's recommendation and
17 "either return the case for further proceedings or * * * forward it to the President with a
18 recommendation as to disposition," if the President has not designated him the final decision-
19 maker. Military Commission Instruction No. 9, § 5. In the absence of such a designation,
20 the President makes the final decision, and may approve or disapprove the commission's
21 findings or "change a finding of Guilty to a finding of Guilty to a lesser-included offense, or
22 mitigate, commute, defer, or suspend the sentence imposed or any portion thereof." Id. § 6.

23 4. Pursuant to the Military Order, on July 3, 2003, the President designated
24 Salim Ahmed Hamdan, a Guantanamo detainee on whose behalf this petition has been filed,
25 for trial by military commission, upon determining that there is reason to believe that Hamdan
26 was a member of al Qaida or otherwise involved in terrorism against the United States. July

27 _____
28 ⁵ These officers may include civilians commissioned pursuant to 10 U.S.C. § 603.

3, 2003 Background Briefing on Military Commissions (Ex. A to 4/5/04 Swift Decl.), at 1.
As a result of this designation, on December 18, 2003, the Department of Defense (DOD)
assigned Lieutenant Commander Charles Swift, the named petitioner, to meet with and defend
Hamdan before a military commission. Dec. 18, 2003 Memorandum Detailing Defense
Counsel (Ex. H to 4/5/04 Swift Decl.). That same month, Hamdan, who had been housed
with other enemy combatants at Guantanamo, was moved to a different facility at
Guantanamo, Camp Echo, where he has his own cell in which he may have private
discussions with his lawyers. Feb. 13, 2004 Briefing on Detainee Operations at Guantanamo
Bay (Ex. C to 4/5/04 Swift Decl.), at 10.

5. On April 6, 2004, Swift filed this petition as an alleged next-friend of
Hamdan challenging Hamdan's pre-trial confinement, prospective trial, and continued
detention on multiple statutory, constitutional, and treaty-based grounds. Pet. 15-23 (Claims
For Relief). The petition requests, among other things, an order mandating Hamdan's release
from confinement in Camp Echo, enjoining respondents from enforcing the Military Order of
November 13, 2001, compelling respondents to justify Hamdan's continued detention as an
enemy combatant, and mandating Hamdan's release from U.S. custody in the absence of
adequate justification. Pet. 24-25 (Prayer For Relief).

6. On July 9, 2004, the prosecutor charged Hamdan with conspiring with Usama
Bin Laden, Dr. Ayman al Zawahari (a/k/a "the Doctor"), and others members and associates
of al Qaida from on or about February 1996 to on or about November 24, 2001, to commit
offenses triable by military commission – namely, attacking civilians, attacking civilian
objects, murder by an unprivileged belligerent, destruction of property by an unprivileged
belligerent, and terrorism. Charge ¶ 12 (attached as Exhibit A); see 32 C.F.R. §§ 11.6(a)(2),
(a)(3), (b)(2), (b)(3), (b)(4). The charge alleges that "[b]etween 1989 and 2001, al Qaida
established training camps, guest houses, and business operations in Afghanistan, Pakistan and
other countries for the purpose of supporting violent attacks against property and nationals
(both military and civilian) of the United States and other countries." *Id.* ¶ 7. It also alleges

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1 that "[i]n February of 1998, Usama Bin Laden, Ayman al Zawahiri and others under the
2 banner of the 'International Islamic Front for Jihad on the Jews and Crusaders,' issued a fatwa
3 (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether
4 civilian or military – anywhere they can be found and to 'plunder their money.'" Id. ¶ 9. It
5 further alleges that "[s]ince 1989, members and associates of al Qaida * * * have carried out
6 numerous terrorist attacks, including, but not limited to: the attacks against the American
7 Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in
8 October 2000; and the attacks on the United States on September 11, 2001." Id. ¶ 11.

9 As for Hamdan's role in the conspiracy, the charge asserts that "[i]n 1996, Hamdan
10 met with Usama bin Laden in Qandahar, Afghanistan, and ultimately became a bodyguard and
11 personal driver for Usama bin Laden," serving in that capacity "until his capture in November
12 of 2001." Id. ¶ 13(a). The charge further alleges that, in furtherance of al Qaida's objectives,
13 Hamdan from 1996 through 2001 "delivered weapons, ammunition or other supplies to al
14 Qaida members and associates," id. ¶ 13(a); "picked up weapons at Taliban warehouses for
15 al Qaida use and delivered them directly to Saif al Adel, the head of al Qaida's security
16 committee, in Qandahar, Afghanistan," id. ¶ 13(b)(1); "purchased or ensured that Toyota
17 Hi Lux trucks were available for use by the Usama bin Laden bodyguard unit tasked with
18 protecting and providing physical security" for bin Laden, id. ¶ 13(b)(2); "served as a driver
19 in a convoy of three to nine vehicles in which Usama bin Laden and others were transported
20 to various areas in Afghanistan" at the time of the 1998 embassy attacks and the September 11
21 attacks, id. ¶ 13(b)(4); "drove or accompanied Usama bin Laden to various al Qaida-
22 sponsored training camps, press conferences, or lectures," id. ¶ 13(c); and "received training
23 on rifles, handguns and machine guns at the al Qaida-sponsored al Farouq camp in
24 Afghanistan," id. ¶ 13(d).

25 The Appointing Authority approved and referred the charge to a Military Commission
26 on July 13, 2004. See Exhibit B. The charge is noncapital, so Hamdan faces a maximum
27 sentence of life imprisonment. Both the government and Hamdan have proposed that his
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Commission trial begin in December. Hamdan is scheduled to appear before the Commission on August 23, 2004, for preliminary matters.⁶

ARGUMENT

Since the founding of this nation, the military has used military commissions during wartime to try violations against the laws of war. Nearly ninety years ago, Congress recognized this historic practice and approved its continuing use. And nearly sixty years ago, the Supreme Court upheld the use of military commissions during World War II against a series of challenges, including cases involving a presumed American citizen, captured in the United States, Ex parte Quirin, 317 U.S. 1 (1942); the Japanese military governor of the Philippines, Yamashita v. Styer, 327 U.S. 1 (1946); German nationals who alleged that they worked for civilian agencies of the German government in China, Johnson v. Eisentrager, 339 U.S. 763 (1950); and the spouse of a serviceman posted in occupied Germany, Madsen v. Kinsella, 343 U.S. 341 (1952). Despite the fact that both Congress and the Judiciary have blessed the Executive's use of military commissions during wartime, despite the fact that the statutory framework today is identical in all material respects to that which existed during the prior legal challenges, and despite the fact that the President has inherent power as Commander in Chief to establish military commissions in the war against al Qaida and the Taliban, petitioner contends that Hamdan's detention pursuant to the Military Order violates federal statutes, the Constitution, and the Geneva Conventions. As discussed in more detail below, these claims cannot be heard at this time and lack merit in any event.⁷

⁶ Before his trial, Hamdan will have the opportunity to challenge his status as an enemy combatant before a Combatant Status Review Tribunal. See July 7, 2004 Order Establishing Combatant Status Review Tribunal, available at www.defenselink.mil/news/Jul/2004/d20040707review.pdf. That Tribunal will only confirm whether Hamdan is properly classified as an enemy combatant, not whether he committed the offense approved and referred for trial by the Military Commission.

⁷ These claims cannot be heard for the additional reasons that petitioner lacks standing to serve as Hamdan's next-friend or as a third party, this Court lacks habeas jurisdiction, a mandamus petition is not appropriate given the nature of petitioner's claims, and this Court is not a proper venue even if mandamus were a proper vehicle. See Respondents' Motion to Dismiss or Transfer dated July 16, 2004.

1 I. THIS COURT SHOULD ABSTAIN UNTIL THE MILITARY PROCEEDINGS
2 ARE COMPLETED AND HAMDAN HAS EXHAUSTED HIS MILITARY
3 REMEDIES

4 Petitioner asks this Court to intercede in the midst of an ongoing military process
5 designed to determine whether Hamdan has committed violations of the laws of war and other
6 offenses triable by military commission. This Court should reject this invitation. Petitioner
7 cannot cite any example of a federal court enjoining a military commission – or a military
8 tribunal of any sort – convened during wartime from trying someone whom the Executive
9 Branch has determined is affiliated with enemy forces. That is because the law is clear that
10 federal courts generally will not consider challenges to military process, jurisdictional or
11 otherwise, until that process has run its course.

12 The leading case governing the role of the federal courts in addressing challenges to
13 military process is Schlesinger v. Councilman, 420 U.S. 738 (1975). There, the Supreme
14 Court rejected an Army captain's attempt to enjoin his impending court-martial on charges
15 that he wrongfully possessed, transferred, and sold marijuana. Councilman contended that the
16 military court lacked jurisdiction because the charges were not "service connected," but the
17 Court held that such a contention did not constitute a sufficient basis to intervene in the
18 military proceedings.

19 At the outset, the Court recognized that "'military law * * * is a jurisprudence which
20 exists separate and apart from the law which governs in our federal judicial establishment.'" Id.
21 at 746 (quoting Burns v. Wilson, 346 U.S. 137, 140 (1953)). In determining the proper
22 role for federal courts presented with challenges to military proceedings, the Court found
23 instructive the federal approach to ongoing state court proceedings. The Court observed that
24 "considerations of comity [and] the necessity of respect for coordinate judicial systems have
25 led this Court to preclude equitable intervention in pending state criminal proceedings unless
26 the harm sought to be averted is both great and immediate, of a kind that cannot be eliminated
27 by * * * defense against a single criminal prosecution." Id. at 756 (internal quotation marks
28 omitted). The Court further observed that this abstention doctrine is "similar" to "the

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1 requirement of the exhaustion of administrative remedies,” which is predicated on “the special
2 competence of agencies * * * to develop the facts, to apply the law in which they are
3 peculiarly expert, and to correct their own errors.” Ibid. “These considerations[,]” the Court
4 concluded, “apply in equal measure to the balance governing the propriety of equitable
5 intervention in pending court-martial proceedings.” Id. at 757.

6 The Court further explained that principles of abstention and exhaustion have special
7 salience in the military context: As the Court observed, “there is here something more that,
8 in our view, counsels strongly against the exercise of equity power even where, under the
9 administrative exhaustion rule, intervention might be appropriate.” Ibid (emphasis added).
10 The Court identified that “something” as “the unique military exigencies” that set the military
11 apart from civilian society and that relate to its “primary business * * * to fight or be ready to
12 fight wars should the occasion arise.” Ibid. Based on these “strong considerations,” id. at
13 761, the Court held that “when a serviceman charged with crimes by military authorities can
14 show no harm other than that attendant to resolution of his case in the military court system,
15 the federal district courts must refrain from intervention, by way of injunction or otherwise.”
16 Id. at 758.

17 The Court rejected Councilman’s contention that the threat of being deprived of his
18 liberty by a court lacking jurisdiction constituted “irreparable harm” justifying federal court
19 intervention. The Court explained that ““(c)ertain types of injury, in particular, the cost,
20 anxiety, and inconvenience of having to defend against a single criminal prosecution, (can) not
21 by themselves be considered “irreparable” in the special legal sense of that term.”” Id. at 755
22 (quoting Younger v. Harris, 401 U.S. 37, 46 (1971)) (parentheses in Councilman).

23 The principles that led the Councilman Court to reject federal court intervention in
24 ongoing military proceedings apply with even greater force here, where the President in his
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1 capacity as Commander in Chief, and with the approval of Congress,⁸ established the military
2 commissions challenged herein upon finding that they are "necessary" for "the effective
3 conduct of military operations and prevention of terrorist attacks." Military Order § 1(e).
4 Given that the Military Order applies to enemy combatants who are captured during the
5 ongoing war with al Qaida and its supporters, the traditional deference courts pay the military
6 justice system is at the pinnacle. The Executive Branch, not this court, bears the
7 responsibility for protecting the nation from foreign attack and is in the best position to
8 determine appropriate procedures for trying enemy combatants charged with violations of the
9 laws of war consistent with national security and the need to provide a full and fair trial. See
10 *id.* §§ 1(f); 4(c)(2). The Executive Branch has exercised that authority in this war by
11 establishing military commissions and an elaborate set of procedures governing their use,
12 including multiple levels of review. See Statement of Facts Part 3, *supra*. In these
13 circumstances, this Court should await the outcome of Hamdan's military prosecution before
14 considering his legal challenges.⁹

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16 ⁸ As discussed in greater detail below, the Supreme Court has repeatedly held that one of
17 the provisions that President Bush expressly invoked in establishing the military commissions,
18 10 U.S.C. § 821, constitutes congressional authorization for the President to convene military
19 commissions during wartime to try violations of the laws of war. And the Supreme Court
20 recently made clear in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640 (2004) (plurality opinion);
21 *id.* at 2679 (Thomas, J., dissenting), that the AUMF triggered the exercise of the President's
22 traditional war powers, including, under 10 U.S.C. § 821, the power to convene military
23 commissions.

24 ⁹ If a United States servicemen does not have access to the federal courts pending his
25 court-martial, surely a nonresident alien captured during wartime should have no greater
26 access pending his military trial. Cf. *Johnson v. Eisentrager*, 339 U.S. 763, 783 (1950)
27 (refusing to read Fifth Amendment in manner that would put enemy aliens "in more protected
28 position than our soldiers."). The exigencies presented by fighting a war with a ruthless
enemy are undoubtedly greater than the exigencies related to the need to maintain discipline in
the armed forces and relied on by *Councilman*.

The fact that the Supreme Court in *Ex parte Quirin*, 317 U.S. 1 (1942), considered the
saboteurs' claims before the military commission proceedings were complete does not support
departure from abstention principles here. *Quirin* was decided over 30 years before
Councilman and well before the abstention doctrine underlying *Councilman* had been
established. See *Younger v. Harris*, 401 U.S. 37 (1971). Moreover, in *Quirin*, the
petitioners included a presumed American citizen and, unlike Hamdan, were facing the
prospect of imminent execution.

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1 Petitioner claims (Mem. 18-19) that Hamdan has already exhausted his military
2 remedies, at least with respect to his speedy trial claim under 10 U.S.C. § 810, because the
3 Appointing Authority has rejected that claim.¹⁰ That argument lacks merit. To begin with,
4 the Appointing Authority is not the final decision-maker under the military commission regime
5 established pursuant to the Military Order. Hamdan is free to raise the issue before his
6 Military Commission and, even if the Military Commission were to consider itself bound by
7 the Appointing Authority's prior determination, the claim would still be subject to
8 consideration by the Review Panel, the Secretary of Defense, and the President. Hamdan
9 therefore has not exhausted his speedy trial claim.

10 Moreover, even assuming that he had, the Councilman rule still calls for abstaining
11 until the military process runs its course. 420 U.S. at 757. Indeed, federal courts have
12 rejected the contention that alleged speedy trial violations cause irreparable harm that justifies
13 pre-trial intervention by a reviewing court. In Carden v. Montana, 626 F.2d 82 (9th Cir.
14 1980), for example, the Ninth Circuit held that an alleged speedy trial violation in state court
15 did not constitute "the type of 'special circumstances' which warrant federal intervention" on
16 habeas. Id. at 84. The court noted that the Supreme Court has identified the limited
17 circumstances in which departure from the abstention doctrine is appropriate, namely, "in
18 cases of proven harassment or prosecutions undertaken by state officials in bad faith without
19 hope of obtaining a valid conviction and perhaps in other extraordinary circumstances were
20 irreparable injury can be shown." Ibid. (quoting Perez v. Ledesma, 401 U.S. 82, 85 (1971)).
21 The Ninth Circuit went on to rule that the petitioners had not shown irreparable injury,
22 because their right to a speedy trial could be vindicated after the trial, via dismissal of the
23 charges. Ibid.

24 The Supreme Court's holding in United States v. MacDonald, 435 U.S. 850 (1978),
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26 ¹⁰ Petitioner states (Mem. 19) that "many of the issues presented here have already been
27 decided by the Appointing Authority," but the record shows that the only claim he has
28 presented to the Appointing Authority is Count One of this petition (denial of speedy trial
under 10 U.S.C. § 810).

1 makes clear that a speedy trial claim does not generally afford a reviewing court a basis to
2 take the extraordinary step of disrupting or precluding a trial. There, the Court ruled that a
3 criminal defendant may not appeal before trial an order denying his motion to dismiss on
4 speedy trial grounds. The Court explained that "the Speedy Trial Clause does not * * *
5 encompass a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at
6 all[.]" id. at 861. Rather, "[i]t is the delay before trial, not the trial itself, that offends against
7 the constitutional guarantee," and whether that delay prejudiced the defendant's ability to
8 obtain a fair trial cannot generally be determined until "after the relevant facts have been
9 developed at trial." Id. at 858.

10 It follows that the one claim for which Hamdan has sought initial review in the military
11 system – a violation of his alleged right to a speedy trial under 10 U.S.C. § 810 – provides
12 no basis for this Court to depart from the Councilman rule. Even assuming Section 810
13 applied to him, but see Part II(A), below, whatever right Hamdan would have under that
14 provision could be fully vindicated under MacDonald through post-trial review of the impact
15 on Hamdan's defense of the allegedly unlawful delay. Because Hamdan has shown "no harm
16 other than that attendant to resolution of his case in the military court system," this Court
17 "must refrain from intervention, by way of injunction or otherwise." Councilman, 420 U.S.
18 at 758.

19 As for the remaining claims in the petition, Hamdan has raised none in the military
20 system. He offers several reasons why this Court should create an exception to the
21 Councilman abstention and exhaustion rule in this case, none of which has merit. First,
22 Hamdan cites Reid v. Covert, 354 U.S. 1 (1957) (plurality opinion), and United States ex rel.
23 Toth v. Quarles, 350 U.S. 11 (1955), for the proposition that the Supreme Court has not
24 always required exhaustion of military remedies before considering challenges to the
25 jurisdiction of military courts to proceed against particular persons. Hamdan's reliance on
26 these cases, however, is misplaced because those cases involved challenges by U.S.-citizens
27 who were undisputedly civilians and were charged with offenses unrelated to warfare. See
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1 United States v. Verdugo-Urquidez, 494 U.S. 259, 270 (1990) (“Since respondent is not a
2 United States citizen, he can derive no comfort from the Reid holding.”). The Court was
3 concerned in those cases about “the disruption caused to petitioners’ civilian lives” by the
4 “deprivation of liberty.” Councilman, 420 U.S. at 759.

5 Here, by contrast, the President has determined that there is reason to believe Hamdan
6 is a member of al Qaida or was otherwise involved in terrorism against the United States.
7 Following that determination, Hamdan was charged with conspiring with Usama bin Laden
8 and other top leaders of al Qaida to commit offenses triable by military commission, namely,
9 attacking civilians, attacking civilian objects, murder by an unprivileged belligerent,
10 destruction of property by an unprivileged belligerent, and terrorism. See Charge (Exhibit
11 A). Hamdan’s military prosecution thus presents military exigencies related to the conduct of
12 war and the national security of the United States that were simply non-existent in Reid and
13 Toth.

14 Petitioner cannot point to any authority for the proposition that the federal courts must
15 determine the correctness of the military’s determination that captured individuals are enemy
16 fighters before the military courts can exercise jurisdiction over those persons. In fact, in
17 Eisentrager, the Court observed that “the ‘power of the military to exercise jurisdiction over
18 members of the armed forces, those directly connected with such forces, or enemy
19 belligerents, prisoners of war, or others charged with violating the laws of war,’” is “‘well-
20 established.’” 339 U.S. at 786 (quoting Duncan v. Kahanamoku, 327 U.S. 304, 312-314
21 (1946) (emphasis added)); ibid. (“[T]he Military Commission is a lawful tribunal to adjudge
22 enemy offenses against the laws of war.”). And on the related question regarding the exercise
23 of jurisdiction over a detained enemy combatant for the duration of the armed conflict, five
24 members of the Supreme Court recently indicated that the military can make that jurisdictional

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determination, even when that detainee is a United States citizen.¹¹ Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2648 (2004) (plurality opinion) (“[A] citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”) (emphasis added); id. at 2651 (standards “could be met by an appropriately authorized and properly constituted military tribunal”); id. at 2674 (Thomas, J., dissenting) (courts cannot second-guess President’s decision to detain enemy combatant). It follows that Hamdan – an alien with no ties to the United States who will have a full and fair opportunity to press his defenses before the Military Commission – has no right to obtain a pre-trial ruling from this Court on the propriety of the commission’s exercise of jurisdiction.¹²

In any event, there is no doubt that the Military Commission has jurisdiction over Hamdan’s person. Military Commission Order No. 1 provides that the military commissions “shall have jurisdiction over only an individual * * * (1) subject to the President’s Military Order and (2) alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority. 32 C.F.R. § 9.3(a). Because the President has determined that Hamdan is subject to the Order, and because Hamdan is alleged to have committed an offense in a charge that has been referred to (and approved by) the Appointing Authority, petitioner’s claim (Mem. 69-71) that the Military Commission lacks jurisdiction

¹¹ Hamdi makes clear that petitioner’s analogy (Pet.’s Mem. 70) to the alien enemy doctrine is inapt. Regardless of the respective competence of the courts and the military in determining whether an individual is a citizen, the question whether an individual captured during wartime is an enemy combatant is a quintessentially military judgment. Indeed, while courts have reviewed the “jurisdictional fact” of whether the petitioner is in fact the citizen of a hostile power and therefore subject to the President’s authority under the Alien Enemy Act, see, e.g., United States ex rel. Schwarzkopf v. Uhl, 137 F.2d 898, 900 (2d Cir. 1943), they will not review the President’s determination that the alien is dangerous and should be removed. See Ludecke v. Watkins, 335 U.S. 160, 164, 170 (1948). The determination whether an individual is an enemy combatant is much more akin to the latter determination than the former.

¹² As mentioned in note 6, above, Hamdan will have an additional opportunity before the Combatant Status Review Tribunal – under procedures equivalent to what the Hamdi plurality suggested would be sufficient for citizens – to show that he is not an enemy combatant.

1 over Hamdan is meritless.

2 Petitioner argues nevertheless (Mem. 21 n.5) that there is an even greater justification
3 for federal court intervention here than in Reid and Toth, because the military courts there
4 “had jurisdiction pursuant to acts of Congress,” whereas the military commissions here were
5 “established by a brief Executive Order.” This argument lacks merit because its premise –
6 that Congress has not authorized the Military Commission to which Hamdan is subject – has
7 been rejected by the Supreme Court numerous times. See Ex parte Quirin, 317 U.S. 1
8 (1942); Yamashita v. Styer, 327 U.S. 1 (1946) (discussed in Part V, infra).

9 Councilman’s abstention and exhaustion rule applies with particular force to challenges
10 such as this one to a wartime prosecution before a military commission, where separation-of-
11 powers principles call for special restraint on the part of the judiciary.¹³ While petitioner
12 claims that federal courts have more expertise when it comes to resolving the claims he has
13 raised, the Supreme Court has never held that the expertise of the federal courts is a sufficient
14 reason standing alone to justify departure from the abstention and exhaustion rule. Indeed, the
15 Councilman Court specifically distinguished Reid and Toth on the basis of the petitioners’
16 undisputed status as civilians who raised “substantial arguments” regarding “the right of the
17 military to try them at all.” Because Hamdan is an alien captured during an ongoing armed
18 conflict and determined by the military to be an enemy combatant, he, unlike the U.S. citizen-
19 spouses of servicemen in Reid and the ex-serviceman in Toth, does not have a “substantial
20 argument” that the military lacks jurisdiction over him. Indeed, the Hamdi Court rejected any
21 notion that the President is disabled from exercising Commander-in-Chief authority over a
22 person detained as an enemy combatant merely because the detainee disputes his status as
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24 ¹³ Petitioner contends that military commissions are less entitled than courts-martial to the
25 assumption that they will “‘vindicate’ defendants’ ‘constitutional rights.’” Pet.’s Mem. 21 n.5
26 (quoting Councilman, 420 U.S. at 758). As a nonresident alien with no voluntary contacts
27 with the United States, however, Hamdan does not have any constitutional rights. See Part
28 IV(A), infra. Second, whatever role the federal courts are to play in reviewing petitioner’s
legal claims, they will be in a much better position to consider the argument that the military
commission’s procedures deprived Hamdan of any constitutional or statutory rights he may
have after the trial has taken place. See MacDonald, supra.

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1 such. 124 S. Ct. at 2642-2643 (plurality opinion); id. at 2674 (Thomas, J. dissenting). The
2 Court ruled that the President has the power to detain an enemy combatant when "it is
3 sufficiently clear that the individual is, in fact, an enemy combatant; whether that is
4 established by concession or by some other process that verifies this fact with sufficient
5 certainty seems beside the point." Id. at 2643.

6 Finally, petitioner contends (Mem. 22) that this Court should intervene because the
7 Military Commission and the Appointing Authority are "highly unlikely" to find that
8 Hamdan's claims have merit. Petitioner relies on Parisi v. Davidson, 405 U.S. 34 (1972),
9 where the Court permitted a habeas claim to proceed while court martial proceedings were
10 pending. That case, however, did "not concern a federal district court's direct intervention in
11 a case arising in the military court system." Id. at 41. Instead, "[t]he petitioner's application
12 for an administrative discharge – upon which the habeas corpus petition was based –
13 antedated and was independent of the military criminal proceedings." Ibid. Moreover, "[t]he
14 procedures and corrective opportunities of the military administrative apparatus had * * * been
15 wholly utilized at the time" of the habeas proceedings, id. at 38-39, and the administrative
16 discharge the petitioner sought was not available as a remedy in the pending court-martial, id.
17 at 43. Here, by contrast, petitioner's claims arise out of Hamdan's designation for trial before
18 the Military Commission and are a direct attack on the authority of that Military Commission
19 to proceed against him; as such they are not independent of the military proceedings, and the
20 military authorities do have the power to order the relief petitioner seeks. Furthermore,
21 petitioner has not exhausted his remedies, and he points to no authority permitting relief from
22 the exhaustion requirement solely based on a litigant's prediction that the forum in which his
23 claims must initially be brought will conclude that they lack merit.

24 In sum, because military proceedings against Hamdan are ongoing, it would be
25 improper for this Court to take up his claims now. If this Court nevertheless chooses to do
26 so, it should still dismiss the petition, because each and every claim petitioner advances lacks
27 merit.
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1 II. HAMDAN'S DETENTION DOES NOT VIOLATE 10 U.S.C. § 810

2 Petitioner argues (Pet.'s Mem. 31-33) that Hamdan's present confinement at Camp
3 Echo violates his alleged right to a speedy trial under Article 10 of the Uniform Code of
4 Military Justice (UCMJ), 10 U.S.C. § 810. Petitioner's claim lacks merit for at least three
5 reasons. First, the President has designated Hamdan for trial by a military commission for
6 violation of the laws of war, so provisions of the UCMJ governing courts-martial do not apply
7 to him. See Ex. E to 4/5/04 Swift Decl (2/23/04 Memorandum from the Appointing
8 Authority Legal Advisor to Charles Swift re: Application of Article 10, UCMJ). Second, as
9 an enemy combatant who is subject to detention for the duration of the ongoing armed
10 conflict, see Hamdi, 124 S. Ct. at 2641-2642 (plurality opinion); id. at 2681-2682 (Thomas,
11 J., dissenting), Hamdan has no legal basis on which to raise a speedy trial claim related to the
12 nature or length of his detention. That is because he has no legal entitlement to a particular
13 form of detention (e.g., to stay at Camp Delta) even assuming he were not subject to trial.
14 Third, even if Article 10 were applicable to him, Hamdan would not be entitled to any relief,
15 because he has failed to show that the military did not act with "reasonable diligence" in
16 bringing and approving charges against him, much less that he has been prejudiced by the
17 alleged delay.

18 A. The Provisions Of The UCMJ Applicable To Courts-Martial Do Not
19 Apply To Hamdan, Whom The President Has Designated For Trial
Before A Military Commission.

20 Petitioner argues (Mem. 29-31) that because the UCMJ extends courts-martial
21 jurisdiction over "persons within an area leased by * * * the United States," 10 U.S.C.
22 § 802(a)(12), it follows that all of the substantive and procedural rules set out in the UCMJ,
23 including Article 10, are automatically applicable to him. There is a crucial flaw in his logic.
24 The rules set out in the UCMJ apply to courts-martial, not commissions. Pursuant to the
25 Military Order, the President designated Hamdan as eligible for trial before a military
26 commission. See Order § 2(b). While the UCMJ recognizes the jurisdiction of military
27 commissions to try violations of the laws of war, see Article 21 ("The provisions of this
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1 chapter conferring jurisdiction upon courts-martial do not deprive military commissions * * *
2 of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of
3 war may be tried by military commissions”), it does not purport to subject such commissions
4 to its comprehensive set of rules governing courts-martial. Indeed, the Supreme Court has
5 repeatedly recognized that while Congress has prescribed in detailed fashion the jurisdiction
6 and procedures governing courts-martial, it has taken a hands-off approach with respect to
7 wartime military commissions, by recognizing and approving their use but not regulating their
8 procedures.

9 In Yamashita v. Styer, 327 U.S. 1 (1946), the Supreme Court expressly rejected the
10 contention that a military commission convened to try General Yamashita, an enemy
11 combatant, was subject to the procedures in the Articles of War (the precursor to the UCMJ)
12 governing courts-martial. The Court explained that, by Article 15 of the Articles of War
13 (now Article 21 of the UCMJ), Congress “recogniz[ed] military commissions in order to
14 preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles,” and
15 “gave sanction * * * to any use of the military commission contemplated by the common law
16 of war.” Id. at 19. Although the Court relied in part on the fact that General Yamashita did
17 not fall within the categories of persons made subject to the jurisdiction of courts-martial by
18 the Articles of War, the Court also based its holding on the fact that “the military commission
19 before which he was tried, though sanctioned, and its jurisdiction saved, by Article 15, was
20 not convened by virtue of the Articles of War, but pursuant to the common law of war,” Ibid.
21 (emphasis added). Moreover, the Court in Madsen v. Kinsella, 343 U.S. 341 (1952),
22 subsequently rejected any suggestion that the Articles of War would apply to the trial by
23 commission of a person subject to court-martial, upholding the trial by military commission of
24 a U.S. citizen subject to the jurisdiction of courts-martial, notwithstanding that the commission
25 trial was not conducted in strict accordance with the specific Articles of War governing
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1 courts-martial.¹⁴

2 The Madsen Court characterized the unique nature and purpose of military
3 commissions:

4 Since our nation's earliest days, such commissions have been constitutionally
5 recognized agencies for meeting many urgent governmental responsibilities related to
6 war. They have been called our commonlaw war courts. They have taken many forms
7 and borne many names. Neither their procedure nor their jurisdiction has been
8 prescribed by statute. It has been adapted in each instance to the need that called it
9 forth.

10 Id. at 346-348 (footnotes omitted) (emphasis added). The Court went on to hold that, "[i]n
11 the absence of attempts by Congress to limit the President's power, it appears that, as
12 Commander-in-Chief of the Army and Navy of the United States, he may, in time of war,
13 establish and prescribe the jurisdiction and procedure of military commissions, and of
14 tribunals in the nature of such commissions, in territory occupied by Armed Forces of the
15 United States." Id. at 348. The Court explained that, in contrast to Congress' active
16 regulation of "the jurisdiction and procedure of United States courts-martial," id. at 349,
17 Congress had shown "evident restraint" with respect to making rules for military
18 commissions, ibid. The Court further explained that Article 15 (now UCMJ Article 21)
19 reflected Congress' intent to allow the Executive Branch to exercise its discretion as to what
20 form of tribunal to employ during wartime. Id. at 353.

21 When the President established military commissions to try unlawful combatants in the
22 ongoing armed conflict with al Qaida and the Taliban and set out the procedures that will
23 govern them, he exercised the very discretion that the Madsen Court held was implicit in his
24 powers as Commander in Chief and was left unrestricted by Congress. See 32 C.F.R. Parts
25 9-17 (2004). Because, as Madsen explained, Congress did not purport to apply the numerous

26 ¹⁴ In Reid v. Covert, 354 U.S. 1 (1957), a plurality of the Supreme Court ruled that a
27 U.S.-citizen civilian spouse of a serviceman could not be subjected to the jurisdiction of a
28 court-martial during peacetime. The Reid plurality concluded that Madsen was not controlling
because Madsen involved a trial in occupied enemy territory, where "the Army commander
can establish military or civilian commissions as an arm of the occupation to try everyone in
the occupied area." 354 U.S. at 35 n.63. Madsen remains good law today, and the Supreme
Court has limited Reid to its facts. See United States v. Verdugo Urquidez, 494 U.S. 259,
270 (1990).

1 UCMJ provisions regulating courts-martial to the common law military commissions,
2 Article 10 of the UCMJ, which sets out a speedy trial standard for courts-martial, is
3 inapplicable to Hamdan.

4 Petitioner contends nevertheless (Mem. 31) that because the President expressly
5 invoked the UCMJ in establishing the military commissions, he must afford Hamdan all of the
6 procedural protections set forth in the UCMJ. The latter proposition does not follow from the
7 former. The President invoked the provisions of the UCMJ that recognize his authority to
8 use military commissions to try violations of the laws of war, Article 21, and to create a set of
9 procedures to govern them, Article 36. Reliance on that authority, which the Supreme Court
10 has construed to set military commissions apart from courts-martial and the UCMJ rules that
11 govern them, could not logically trigger application of the entire UCMJ. Indeed, that is
12 essentially the argument the Court rejected in Yamashita and Madsen. In any event, that
13 enemy combatants facing military commissions do not receive the protection of Article 10 is
14 not "contrary to or inconsistent with" the UCMJ, 10 U.S.C. § 836(a), because, as Congress
15 recognized in taking a hands-off approach, military commissions convened during wartime to
16 try violations of the laws of war must deal with military exigencies in administering justice.
17 Because of the unique context in which the commissions operate, and the need for flexibility
18 that context presents, it is not "contrary to or inconsistent with" the UCMJ for the
19 commissions to try enemy combatants for violations of the laws of war without adhering to the
20 speedy trial rules that apply to courts-martial.¹⁵

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24 ¹⁵ Even assuming that Article 10 does apply to the military commissions, Hamdan cannot
25 claim its protection, at least insofar as he seeks release from his present confinement. That is
26 because the military has determined that Hamdan is an enemy combatant. As such, he may be
27 detained for the duration of hostilities. Hamdi, 124 S. Ct. at 2641 (plurality opinion); id. at
28 2679 (Thomas, J. dissenting) (suggesting enemy combatant can be detained past cessation of
formal hostilities). In light of his combatant status, Hamdan has no legal right to seek release
from a particular form of confinement based on the length of time he has been held without a
trial, even assuming that the speedy trial standards applied and that the military was not
complying with them.

1 B. Even Assuming Hamdan Has Standing To Assert A Violation Of
2 Article 10, His Claim Fails As A Matter Of Law.

3 Even assuming speedy trial concepts under Article 10 applied to Hamdan's
4 confinement, petitioner has not established any violation. In order to prevail on an Article 10
5 claim, petitioner must establish that the government has failed to proceed against Hamdan with
6 "reasonable diligence." United States v. Cooper, 58 M.J. 54, 58 (C.A.A.F. 2003). All that
7 petitioner states on this score is that "the Government did not need over two years to gather
8 evidence." Pet.'s Mem. 32. That conclusory statement is patently insufficient. To begin
9 with, to the extent there is any relevant time period for an individual lawfully detained as an
10 enemy combatant, the Article 10 clock would not begin to run until the detainee is "ordered
11 into arrest or confinement" pursuant to a charge. 10 U.S.C. § 810; see Cooper, 58 M.J. at
12 58 (Article 10 triggered "when a servicemember is placed in pretrial confinement"). Thus,
13 any speedy trial clock here would not have begun to run until December 2003, when Hamdan
14 was placed in Camp Echo to facilitate his ability to meet with counsel in connection with the
15 impending charges.

16 Moreover, the amount of time that has elapsed, standing alone, does not suggest, much
17 less establish, the absence of reasonable diligence. As the military courts have made clear,
18 "[t]here is no 'magic number' of days in pretrial confinement which would give rise to a
19 presumption of an Article 10, UCMJ, speedy trial violation." United States v. Goode, 54
20 M.J. 836 (N-M Ct. Crim. App. 2001); United States v. Kossman, 38 M.J. 258 (C.M.A.
21 1993) ("Pointedly, however, the drafters of Article 10 made no provision as to hours or days
22 in which a case must be prosecuted because there are perfectly reasonable exigencies that arise
23 in individual cases which just do not fit under a set time limit.") (internal quotation marks
24 omitted). In the Goode case, the court held that a defendant who spent 337 days in pretrial
25 confinement failed to make out an Article 10 or constitutional speedy trial violation. Id. at
26 838-840. Here, the government has charged Hamdan with participating in a foreign-based,
27 far-reaching conspiracy spanning five and a half years. See Charge ¶¶ 12-13 (Exhibit A). The
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1 breadth and complexity of the charge as well as the fact that it was brought during the ongoing
2 war against al Qaida and its supporters refutes petitioner's unsupported assertion that the
3 government is engaged in "foot dragging." Mem. 32. See Barker v. Wingo, 407 U.S. 514,
4 531 (1972) ("[T]he delay that can be tolerated for an ordinary street crime is considerably less
5 than for a serious, complex conspiracy charge.").

6 Petitioner's claim also founders on his failure to show prejudice from the alleged delay.
7 See Barker, 407 U.S. at 533-534 (identifying four factors relevant to constitutional speedy
8 trial claim, including prejudice to the defendant, and holding that defendant was minimally
9 prejudiced by delay of more than five years); MacDonald, 435 U.S. at 858 (constitutional
10 speedy trial right protects against three types of injury, but "the most serious" is impairment
11 of the defense caused by delay); Cooper, 58 M.J. at 61 (directing military courts to consider
12 Barker factors in evaluating Article 10 claim). Petitioner's contention that his defense will be
13 based on testimony "that grows more stale with each passing day" falls well short of the
14 mark. Such "[g]eneralized assertions of the loss of memory, witnesses, or evidence are
15 insufficient to establish actual prejudice." United States v. Manning, 56 F.3d 1188, 1194 (9th
16 Cir. 1995). Likewise, petitioner's assertion (Pet.'s Mem. 33) that Hamdan's present
17 confinement "creates a genuine risk of psychological injury," that could impair his ability to
18 assist in his own defense is precisely the kind of speculative claim that cannot form the basis
19 for a finding of prejudice.¹⁶ See ibid. (rejecting prejudice claim that embraces "pure
20 conjecture"). Petitioner's speedy trial claim must therefore be dismissed.

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22 **III. HAMDAN'S CONFINEMENT PRIOR TO TRIAL DOES NOT VIOLATE**
23 **THE GENEVA CONVENTIONS**

24 Petitioner contends (Mem. 33-41) that Hamdan's confinement in Camp Echo prior to
25 his trial violates Article 103 of the Geneva Convention Relative to the Treatment of Prisoners

26 ¹⁶ The vague and generalized nature of petitioner's claims only serve to highlight the
27 premature status of this proceeding. See Part I (Argument), supra. Because "resolution of a
28 speedy trial claim necessitates a careful assessment of the particular facts of the case," the
claim – if it can be considered in federal court at all – is "best considered only after the
relevant facts have been developed at trial." MacDonald, 435 U.S. at 858.

of War (GPW), 6 U.S.T. 3316 (1955),¹⁷ and Common Article 3¹⁸ of the same treaty. Because the Geneva Conventions (1) are not self-executing, (2) do not apply to this conflict, and (3) do not afford a basis for relief even if they were self-executing and applied to this conflict, petitioner's claim lacks merit.

A. The Geneva Conventions Are Not Self-Executing.

Petitioner's reliance on provisions of the 1949 Geneva Conventions fails at the outset, because, as the Conventions' text and legislative history conclusively show, and as a solid majority of courts have held, those Conventions are not self-executing. Indeed, the GPW contains many provisions that, when considered together, demonstrate that the contracting parties understood that violations of the treaty would be enforced through diplomatic means.

As the Fourth Circuit recently explained:

¹⁷ That Article provides, in relevant part:

Judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offense, or if it is essential to do so in the interests of national security. In no circumstances shall this confinement exceed three months.

GPW art. 103.

¹⁸ That Article provides, in relevant part:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

GPW art. 3.

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1 [W]hat discussion there is [in the text of the GPW] of enforcement focuses
2 entirely on the vindication by diplomatic means of treaty rights inhering in sovereign
3 nations. If two warring parties disagree about what the Convention requires of them,
4 Article 11 instructs them to arrange a "meeting of their representatives" with the aid of
5 diplomats from other countries, "with a view to settling the disagreement." Geneva
6 Convention, at art. 11. Similarly, Article 132 states that "any alleged violation of the
7 Convention" is to be resolved by a joint transnational effort "in a manner to be decided
8 between the interested Parties." *Id.* at art. 132; *cf. id.* at arts. 129-30 (instructing
9 signatories to enact legislation providing for criminal sanction for "persons committing
10 * * * grave breaches of the present Convention"). We therefore agree with other
11 courts of appeals that the language in the Geneva Convention is not "self-executing"
12 and does not "create private rights of action in the domestic courts of the signatory
13 countries." *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978) (applying
14 identical enforcement provisions from the Geneva Convention Relative to the Protection
15 of Civilian Persons in Time of War, Feb. 2, 1956, 6 U.S.T. 3516); *see also Holmes v.*
16 *Laird*, 459 F.2d 1211, 1222 (D.C. Cir. 1972) (noting that "corrective machinery
17 specified in the treaty itself is nonjudicial").

18 *Hamdi v. Rumsfeld*, 316 F.3d 450, 468-469 (4th Cir. 2003), vacated on other grounds,
19 124 S. Ct. 2686 (2004); *see also Al Odah v. United States*, 321 F.3d 1134, 1147 (D.C. Cir.
20 2003) (Randolph, J., concurring), overruled on other grounds, *Rasul v. Bush*, 124 S. Ct. 2686
21 (2004); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-810 (D.C. Cir. 1984) (Bork,
22 J., concurring); *Handel v. Artukovic*, 601 F. Supp. 1421, 1424-1426 (C.D. Cal. 1985).¹⁹

23 ¹⁹ Article 11 provides in full:

24 In cases where they deem it advisable in the interest of protected persons, particularly
25 in cases of disagreement between the Parties to the conflict as to the application or
26 interpretation of the provisions of the present Convention, the Protecting Powers shall lend
27 their good offices with a view to settling the disagreement.

28 For this purpose, each of the Protecting Powers may, either at the invitation of one
Party or on its own initiative, propose to the Parties to the conflict a meeting of their
representatives, and in particular of the authorities responsible for prisoners of war, possibly
on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to
the proposals made to them for this purpose. The Protecting Powers may, if necessary,
propose for approval by the Parties to the conflict a person belonging to a neutral Power, or
delegated by the International Committee of the Red Cross, who shall be invited to take part in
such a meeting.

Article 132 provides in full:

At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to
be decided between the interested Parties, concerning any alleged violation of the Convention.
If agreement has not been reached concerning the procedure for the enquiry, the Parties
should agree on the choice of an umpire who will decide upon the procedure to be followed.
Once the violation has been established, the Parties to the conflict shall put an end to it and
shall repress it with the least possible delay.

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1 The Fourth Circuit alluded to the fact that there was one area in which the contracting parties
2 sought to go beyond diplomacy to enforce violations of the treaty: "grave breaches," which
3 the parties pledged to punish themselves by enacting domestic criminal legislation.
4 See Article 129 (GPW) ("The High Contracting Parties undertake to enact any legislation
5 necessary to provide effective penal sanctions for persons committing, or ordering to be
6 committed, any of the grave breaches of the present Convention defined in [Article 130].");
7 Article 130 ("Grave breaches to which the preceding Article relates shall be those involving
8 any of the following acts, if committed against person or property protected by the
9 Convention: * * * wilfully depriving a prisoner of war of the rights of fair and regular trial
10 prescribed in this Convention.").²⁰ Congress responded by enacting the War Crimes Act of
11 1996, 18 U.S.C. § 2441. That Act provides a means for remedying grave breaches, but
12 obviously does not create any privately enforceable rights. The Executive Branch, through its
13 ability to bring prosecutions, remains responsible for ensuring adherence to the treaty. In
14 light of this clear textual framework for enforcing the treaty, there is no sound basis on which
15 to conclude that the treaty provided prisoners of war, let alone unlawful combatants such as
16 Hamdan, with private rights of action.

17 Contrary to petitioner's claim (Mem. 39-40), the legislative history does not suggest
18 otherwise. In fact, the Senate Report on which petitioner relies makes clear that the GPW is
19 not self-executing. In a section titled "Provisions Relating To Execution Of The
20 Conventions," the Report states that "[t]he parties agree, moreover, to enact legislation
21 necessary to provide effective penal sanctions for persons committing violations of the

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23 ²⁰ The other Articles of the GPW governing execution of the Convention reinforce the
24 conclusion that the treaty is not self-executing. They call for the contracting parties to permit
25 representatives of the Protecting Powers (neutral nations) and the International Committee of
26 the Red Cross to visit prisoners of war (Art. 126); to inculcate the principles of the
27 Convention in their countries' populace (Art. 127); and to communicate with one another
28 "through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the
official translations of the present Convention, as well as the laws and regulations which they
may adopt to ensure the application thereof," (Art. 128) (emphasis added). See also Art. 8
("The present Convention shall be applied with the cooperation and under the scrutiny of the
Protecting Powers [neutral nations] whose duty it is to safeguard the interests of the Parties to
the conflict.").

1 | contentions enumerated as grave breaches[.]” S. Exec. Rep. No. 84-9 (1955), at 7. The
2 | Report celebrates this provision as “an advance over the 1929 [Geneva] instruments which
3 | contained no corresponding provisions.” Ibid.

4 | Significantly, the Supreme Court interpreted the 1929 Geneva Convention in Johnson
5 | v. Eisentrager, 339 U.S. 763 (1950), and held that it was not self-executing. The Court ruled
6 | there that the German prisoners of war who were challenging the jurisdiction of the military
7 | commission which convicted them “could not” invoke the Geneva Convention because

8 | It is * * * the obvious scheme of the Agreement that responsibility for
9 | observance and enforcement of these rights is upon political and military authorities.
10 | Rights of alien enemies are vindicated under it only through protests and intervention of
11 | protecting powers as the rights of our citizens against foreign governments are
12 | vindicated only by Presidential intervention.

11 | Id. at 789 & n. 14. The Senate that ratified the 1949 GPW was operating against the
12 | backdrop of Eisentrager, yet in discussing the “advance[s]” over the 1929 treaty, it never so
13 | much as suggested that alleged violations of the updated GPW could be enforced through
14 | private actions. To the contrary, the one “advance” contemplated and remarked upon was the
15 | enactment of criminal legislation to address “grave breaches.” S. Exec. Rep. No. 84-9
16 | (1955), at 7, 27 (“the grave breaches provisions cannot be regarded as self-executing”).
17 | Moreover, in addressing how future compliance with the treaty would be achieved, the Senate
18 | Report did not mention legal claims or judicial machinery, but instead observed that “the
19 | weight of world opinion,” would “exercise a salutary restraint on otherwise unbridled
20 | actions.” Id. at 32.

21 | Given that it is apparent on the face of the treaty and from the legislative history that
22 | the parties contemplated the need for enacting legislation, the Fourth Circuit’s conclusion in
23 | Hamdi that the GPW is not self-executing is undoubtedly correct. Petitioner’s claim
24 | (Mem. 37) that this Court is “bound” by the Ninth Circuit’s decision in In re Territo, 156

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1 F.2d 142 (9th Cir. 1946), is wrong on several counts.²¹ First, that case, which involved an
2 American citizen's challenge to his confinement as a prisoner of war, did not involve the
3 GPW, but rather, its 1929 precursor. Second, the Territo court did not hold that the 1929
4 treaty was self-executing, nor did it have occasion to decide the question, because the prisoner
5 did not claim on appeal that his detention violated the Geneva Convention; he claimed the
6 treaty was not applicable. Id. at 145. Finally, even if the Territo court had held the 1929
7 Convention self-executing, Eisentrager expressly rejected that notion four years later. 339
8 U.S. at 789 n.14.

9 B. The Geneva Conventions Do Not Apply To The United States' Armed
10 Conflict Against Al Qaida Under The Terms Of Common Article 2.

11 The Geneva Conventions do not apply to every conceivable armed conflict. Article 2
12 of the GPW provides for only three circumstances in which the Geneva Conventions "apply":
13 (a) in "all cases of declared war or of any other armed conflict which may arise between two
14 or more of the High Contracting Parties," art. 2(1); (b) in 'all cases of partial or total
15 occupation of the territory of a High Contracting Party," art.2(2); or (c) when a non-signatory
16 "Power[] in conflict" "accepts and applies the provisions [of GC]," art.2(3). Because the
17 armed conflict between the United States and al Qaida satisfies none of these situations, the
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19 ²¹ Petitioner's reliance on United States v. Noriega, 808 F. Supp. 791 (S.D. Fla. 1992),
20 United States v. Lindh, 212 F. Supp.2d 541 (E.D. Va. 2002), and Padilla ex rel. Newman v.
21 Bush, 233 F. Supp.2d 564 (S.D.N.Y. 2002), rev'd in part, 352 F.3d 695 (2d Cir. 2003),
22 rev'd sub nom. Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004), is likewise misplaced. Padilla
23 did not address whether the GPW authorizes private rights of action, see id. at 590. Lindh
24 permitted the assertion of the GPW "as a defense to criminal prosecution"; however, the
25 Fourth Circuit in Hamdi subsequently held the GPW to be non-self-executing. Hamdi, 316
26 F.3d at 468. As for Noriega, the district court discussed the GPW in an advisory opinion.
27 808 F. Supp. at 793, 799 (acknowledging that issue was not presented "in the context of a live
28 controversy"). Moreover, Noriega's discussion does not apply to GPW Articles 3 and 103,
the two provisions on which petitioner relies. That is because the court viewed the GPW
Articles at issue as self-executing on the theory that the "grave breaches" cited in the GPW
and expressly requiring implementing legislation did not refer to those Articles. Id. at 797
n.8. In contrast, violations of Articles 3 and 103, if proven, would constitute grave breaches
of the GPW, see Art. 130 (willful deprivation of POW's right to fair trial), which under the
plain terms of the treaty cannot be enforced without implementing legislation, and which, as
contemplated by the Treaty, are to be remedied by the possibility of criminal sanction, not
private rights of action.

1 Geneva Conventions do not apply to al Qaida fighters such as Hamdan.

2 The President has found that the armed conflict between the United States and al Qaida
3 does not come within Article 2 of the GPW. See Memorandum for the Vice President, et al.
4 From President, Re: Humane Treatment of al Qaeda and Taliban Detainees at 1 (Feb. 7,
5 2002), available at www.library.law.pace.edu/government/detainee_memos.html. The
6 President's determination is undoubtedly correct as a matter of law. The U.S.-al Qaida armed
7 conflict is not one "between two or more of the High Contracting Parties" within the meaning
8 of article 2(1). Al Qaida has not signed or ratified the GPW. Nor could it. Al Qaida is not a
9 State. Rather, it is a terrorist organization composed of members from many nations, with
10 ongoing military operations in many nations. As a non-State entity, it cannot be a "High
11 Contracting Party" to the Convention. In addition, the U.S.-al Qaida armed conflict has not
12 resulted in the "occupation of the territory of a High Contracting Party" within the meaning of
13 article 2(2). As a non-State actor, al Qaida has no territory that could be occupied within the
14 meaning of article 2(2). Nor is it a "Power in conflict" that can "accept[] and appl[y]" the
15 Convention within the meaning of article 2(3). See, e.g., G.I.A.D. Draper, The Red Cross
16 Conventions 16 (1958) (arguing that "in the context of Article 2, para. 3, 'Powers' means
17 States capable then and there of becoming Contracting Parties to these Conventions either by
18 ratification or by accession"); 2B Final Record of the Diplomatic Conference of Geneva of
19 1949, at 108 (explaining that article 2(3) would impose an "obligation to recognize that the
20 Convention be applied to the non-Contracting adverse State, in so far as the latter accepted
21 and applied the provisions thereof" (emphasis added) ("Final Record"); 4 Pictet,
22 Commentary, at 23 (using "non-Contracting State" interchangeably with "non-Contracting
23 Power" and "non-Contracting Party"). In any event, far from embracing the Convention or
24 any other provision of the law of armed conflict, al Qaida has consistently acted in flagrant
25 defiance of the law of armed conflict.

26 In sum, the Geneva Conventions are inapplicable to the United States' armed conflict
27 with al Qaida, and for this reason as well Hamdan cannot claim their protections.

28
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1 C. GPW 103 And Common Article 3 Are Facially Inapplicable To Hamdan.

2 Even assuming Hamdan could claim protection under the Conventions, his claims
3 would still fail as a matter of law.

4 1. GPW Article 103 does not apply to Hamdan. That Article provides, in relevant
5 part:

6 Judicial investigations relating to a prisoner of war shall be conducted as rapidly
7 as circumstances permit and so that his trial shall take place as soon as practicable. A
8 prisoner of war shall not be confined while awaiting trial unless a member of the armed
9 forces of the Detaining Power would be so confined if he were accused of a similar
10 offence, or if it is essential to do so in the interests of national security. In no
11 circumstances shall this confinement exceed three months.

12 GPW art. 103 (emphasis added). The problem for Hamdan is that he is not a "prisoner of
13 war" eligible for Article 103's protection. GPW Article 4 makes clear that prisoners of war
14 "carry[] arms openly" and "conduct[] their operations in accordance with the laws and
15 customs of war." Those, like Hamdan, who fail to adhere to those conditions are not entitled
16 to prisoner of war status and its attendant benefits when captured. See S. Exec. Rep. No. 84-
17 9, at 5 ("extension of [the treaty's] protection to 'partisans' does not embrace that type of
18 partisan who performs the role of farmer by day, guerilla by night"). The President has
19 determined that Hamdan is subject to the Military Order. See Ex. A to 4/5/04 Swift Decl.
20 As a member of al Qaida or otherwise involved in terrorism against the United States,
21 Hamdan by definition does not observe the criteria necessary to qualify as a prisoner of war.
22 See Padilla, 233 F. Supp.2d at 593 (citing the "obvious conclusion" that "when the President
23 designated Padilla an 'enemy combatant,' he necessarily meant that Padilla was an unlawful
24 combatant, acting as an associate of a terrorist organization whose operations do not meet the
25 * * * criteria necessary to confer lawful combatant status on its members and adherents").

26 Petitioner nevertheless argues (Mem. 34) that Hamdan is entitled to Article 103's
27 protection because doubt has arisen as to his status as an unlawful combatant and that, in the
28

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1 face of this doubt, GPW Article 5²² and various United States military regulations require that
2 he receive full prisoner of war protection until a competent tribunal has determined his status.
3 Pet.'s Mem. 34 (citing GPW, 6 U.S.T. at 3324 (art. 5); Army Regulation 190-8 § 1-6(A)
4 (1997), at 70; Dep't of the Navy, NWP 1-14M 11.7 (1995), at 77). But petitioner never
5 explains why doubt has arisen as to his status. He acknowledges that he was closely affiliated
6 with Usama bin Laden for a lengthy period of time, and he does not claim, much less present
7 evidence, that he followed a responsible commander, bore a fixed, distinctive sign, carried
8 arms openly, or observed the laws of war. See GPW art. 4(A)(2). Because both the
9 President and a federal court, see Padilla, supra, have determined that al Qaida is not entitled
10 to protection as prisoners of war, there can be no doubt about his unlawful combatant status.

11 2. Hamdan's Common Article 3 claim fares no better. Article 3, which prohibits
12 "the passing of sentences and the carrying out of executions without previous judgment"
13 applies only "[i]n the case of armed conflict not of an international character occurring in the
14 territory of one of the High Contracting Parties." The United States' war against al Qaida,
15 however, is a conflict of "an international character," and it is not limited to the territory of
16 "one of the High Contracting Parties." (Emphasis added.) Al Qaida operates in many
17 countries and our armed conflict with al Qaida terrorists extends not only to Afghanistan but
18 to Pakistan, countries in Europe and southeast Asia, and the United States itself.
19 See Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes
20 II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General,
21 Office of Legal Counsel, Re: Application of Treaties and Laws to al Qaeda and Taliban
22 detainees, at 5-9 (Jan. 22, 2002), available at

23
24 ²² That provision provides in relevant part that

25 Should any doubt arise as to whether persons, having committed a belligerent act and
26 having fallen into the hands of the enemy, belong to any of the categories enumerated in
27 Article 4, such persons shall enjoy the protection of the present Convention until such time as
28 their status has been determined by a competent tribunal.

GPW art. 5.

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1 | www.library.law.pace.edu/government/detainee_memos.html. Thus, by its own terms,
2 | Article 3 does not apply to the conflict pursuant to which Hamdan remains confined.

3 | Even if the protections in common Article 3 did apply, Hamdan's treatment would not
4 | violate that article. He has not been "sentenced * * * without previous judgment." To the
5 | contrary, the proceedings against Hamdan are in their preliminary stages. Hamdan was
6 | charged with an offense on July 9, 2004, and that charge was approved and referred by the
7 | Appointing Authority on July 13, 2004. The parties have proposed December dates for his
8 | trial by military commission. At his trial, Hamdan will enjoy, inter alia, the presumption of
9 | innocence, the assistance of counsel, and the opportunity to cross-examine prosecution
10 | witnesses, and the government will have to prove his guilt beyond a reasonable doubt.
11 | See Statement of Facts Part 3, supra. And any finding of guilt will be reviewed by a review
12 | panel, the Secretary of Defense, and the President, if the President does not designate the
13 | Secretary as the final decision-maker. This process is undoubtedly consistent with the
14 | protections set out in Common Article 3.

15 | Moreover, Hamdan's confinement pending his military trial does not constitute the
16 | "passing of [a] sentence[] * * * without previous judgment." GPW Art. 3(1)(d). Hamdan is
17 | not being confined in Camp Echo as a punishment for the offense he is alleged to have
18 | committed. Rather, by virtue of being designated as eligible for trial before a military
19 | commission, Hamdan was assigned petitioner as his counsel to assist him with the legal
20 | proceedings. In order to facilitate contacts between the military commission designees and
21 | their counsel without jeopardizing security at Guantanamo, the military established a separate
22 | facility at Camp Echo to house Hamdan and the other designees. Confining Hamdan for
23 | substantial security reasons to facilitate his access to counsel pending his wartime trial does
24 | not constitute "punishment." To the contrary, it is well established that the wartime detention
25 | of an enemy combatant is a legitimate war measure, not punishment. Hamdi, 124 S. Ct. at
26 | 2640 ("The purpose of detention is to prevent captured individuals from returning to the field
27 | of battle and taking up arms once again.") (plurality opinion).

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1 IV. PETITIONER'S EQUAL PROTECTION CLAIMS ARE MERITLESS

2 Petitioner advances the novel argument (Mem. 61-68) that the Military Order violates
3 the equal protection component of the Fifth Amendment and 42 U.S.C. § 1981, because it
4 applies to non-citizens only. Like the other claims the petition raises, there are numerous
5 reasons why it lacks merit. First, as the Supreme Court held in United States v. Verdugo
6 Urquidez, 494 U.S. 259 (1990), and Johnson v. Eisentrager, 339 U.S. 763 (1950), Hamdan,
7 as an alien with no voluntary connection to the United States, has no Fifth Amendment rights.
8 Second, even apart from those decisions, Hamdan's equal protection claim would fail because
9 Hamdan is not a member of a suspect class and, even if he were, courts have historically
10 shown extraordinary deference to the federal government regarding its policies toward aliens,
11 deference that reaches its apex when applied to decisions of the President during wartime that
12 implicate national security and sensitive foreign policy matters. Third, and related to the first
13 point, the military order does not discriminate against Hamdan in its allocation of fundamental
14 rights, because Hamdan has no fundamental right to avoid trial by a military commission.
15 Finally, Hamdan's statutory claim fails because the statute is facially inapplicable to federal
16 action, and, in any event offers no greater protection than the Constitution.

17 A. The Equal Protection Component Of The Fifth Amendment Does Not
18 Extend To Hamdan.

19 As a non-resident alien with no voluntary contacts with the United States, Hamdan
20 cannot invoke the Constitution of the United States. In fact, the Supreme Court has already
21 expressly rejected the claim that the equal protection component of the Fifth Amendment
22 applies to non-resident aliens such as Hamdan. In United States v. Verdugo-Urquidez, a
23 nonresident alien whose Mexican residence was searched by federal agents, contended not
24 only that the search violated his Fourth Amendment rights, but also that it violated the equal
25 protection component of the Fifth Amendment by treating him differently from citizens with
26 respect to the Fourth Amendment. 494 U.S. at 273. The Court flatly rejected this contention,
27 explaining that "[n]ot only are history and case law against [Verdugo-Urquidez], but as
28

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1 pointed out in Johnson v. Eisentrager, 339 U.S. 763 * * * (1950), the result of accepting this
2 claim would have significant and deleterious consequences for the United States in conducting
3 activities beyond its boundaries.” Verdugo-Urquidez, 494 U.S. at 273. The Court also
4 rejected Verdugo-Urquidez’s reliance on a series of cases, including Plyler v. Doe, 457 U.S.
5 202 (1982), extending some constitutional protection to aliens. Verdugo-Urquidez, 494 U.S.
6 at 271. The Court explained that those cases “establish only that aliens receive constitutional
7 protections when they have come within the territory of the United States and developed
8 substantial connections with this country.” Ibid. Because Verdugo-Urquidez “is an alien who
9 has had no previous significant voluntary connection with the United States,” the Court held
10 that those cases “avail him not.” Ibid.

11 Petitioner’s equal protection argument does not cite or discuss Verdugo-Urquidez or
12 Eisentrager. But those decisions make clear that Hamdan, as a non-resident alien with no
13 voluntary, substantial contacts with the United States, see ibid. (“lawful but involuntary”
14 presence does not constitute “substantial connection”), cannot assert an equal protection
15 claim. Verdugo-Urquidez reiterated Eisentrager’s “emphatic” rejection of the extension of
16 Fifth Amendment protections to nonresident aliens such as Hamdan. 494 U.S. at 269. The
17 Eisentrager defendants, like Hamdan, challenged their trial before a military commission on
18 Fifth Amendment grounds. The Fifth Amendment, the Court explained, does not “confer[]
19 rights upon all persons, whatever their nationality, wherever they are located and whatever
20 their offenses[.]” Id. at 783. If it were otherwise “enemy elements * * * could require the
21 American judiciary to assure them freedoms of speech, press, and assembly as in the First
22 Amendment, right to bear arms as in the Second, security against ‘unreasonable searches and
23 seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.”
24 Id. at 784. Had the Bill of Rights been meant to apply so broadly, the Court explained, “it
25 could scarcely have failed to excite contemporary comment,” yet “[n]ot one word can be
26 cited,” and “[n]o decision of th[e] Court supports such a view.” Id at 784-785; see Zadvydas
27 v. Davis, 533 U.S. 678, 693 (2001) (deeming it “well established” that due process
28

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1 protections "are unavailable to aliens outside of our geographic borders"); United States v.
2 Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the
3 laws passed in pursuance of it have any force in foreign territory unless in respect of our own
4 citizens[.]").²³ Verdugo-Urquidez and Eisentrager thus bar petitioner's equal protection
5 claim.²⁴

6
7 B. Even If Hamdan Could Invoke The Fifth Amendment, His Claim Lacks
8 Merit.

9 Even assuming contrary to Verdugo-Urquidez and Eisentrager that Hamdan could raise
10 a claim under the Fifth Amendment's equal protection component, that claim lacks merit. The
11 President found that in order "[t]o protect the United States and its citizens," it was
12 "necessary" to establish military commissions to try non-citizens captured during the ongoing
13 armed conflict for violations of the laws of war. Military Order § 1(e). If this politically
14 sensitive determination is reviewable at all, it is subject to the utmost deference, because it
15 constitutes an exercise of the President's war powers vis-a-vis aliens and implicates pressing
16 national security and foreign policy concerns. As the Supreme Court has repeatedly observed,

17 [A]ny policy toward aliens is vitally and intricately interwoven with
18 contemporaneous policies in regard to the conduct of foreign relations, the war power,

18 ²³ See also Harbury v. Deutsch 233 F.3d 596, 602-604 (D.C. Cir. 2000) (Guatemalan
19 citizen has no Fifth Amendment rights); Cuban American Bar Ass'n v. Christopher, 43 F.3d
20 1412, 1428 (11th Cir. 1995) (alien migrants at Guantanamo Bay have no constitutional rights);
21 Kamrin v. United States, 725 F.2d 1225, 1228 (9th Cir. 1984) ("[I]t has long been settled that
22 United States due process rights cannot be extended extraterritorially.").

23 ²⁴ The Court's recent decision in Rasul v. Bush, 124 S. Ct. 2686 (2004), in no way affects
24 Eisentrager's and Verdugo-Urquidez's rulings that non-resident aliens are not entitled to Fifth
25 Amendment protections. Rasul only decided the question whether U.S. courts have statutory
26 jurisdiction over petitions for writs of habeas corpus filed by aliens located outside U.S.
27 territory. See 124 S. Ct. at 2695 ("Eisentrager plainly does not preclude the exercise of §
28 2241 jurisdiction over petitioners' claims."). Rasul said nothing about the possession of
constitutional rights by non-resident aliens. Its footnote stating that "petitioners' allegations *
* * unquestionably describe 'custody in violation of the Constitution or laws or treaties of the
United States,'" id. at 2698 n.15, is dictum which cannot be construed to overrule prior
holdings of the Court and which, in any event, does not specify that the allegations make out a
constitutional violation, as opposed to some other form of violation. In any event, to the
extent non-resident aliens held in Guantanamo enjoy any constitutional rights, they clearly
would enjoy less rights than citizens detained under similar circumstances. Cf. The Insular
Cases (discussed in Verdugo-Urquidez, 494 U.S. at 268).

1 and the maintenance of a republican form of government. Such matters are so
2 exclusively entrusted to the political branches of government as to be largely immune
3 from judicial inquiry or interference.

4 Matthews v. Diaz, 426 U.S. 67, 81 n.17 (1976) (quoting Harisiades v. Shaughnessy, 342
5 U.S. 580, 588-589 (1952)). Petitioner offers no basis for disturbing the President's judgment
6 here.

7 1. Heightened Scrutiny Applies Only to State Actions That Affect
8 Resident Aliens.

9 Petitioner asserts (Mem. 62-63) that aliens are a suspect class, citing In re Griffiths,
10 413 U.S. 717, 721-722 (1973), and Graham v. Richardson, 403 U.S. 365, 372 (1971), for
11 this proposition. Those cases, however, stand for a substantially narrower point: that lawful,
12 resident aliens are a suspect class for equal protection purposes, and that policies that
13 differentiate between that group and other similarly situated persons are subject to "close
14 judicial scrutiny." Graham, 403 U.S. at 372. Nothing in either case suggests that the
15 Supreme Court meant to include aliens differently situated from Griffiths and Richardson, who
16 were lawfully admitted resident aliens. See, e.g., Griffiths, 413 U.S. at 722 (according
17 protection to resident aliens on the premise that "like citizens, [they] pay taxes, support the
18 economy, serve in the Armed Forces, and contribute in myriad other ways to our society");
19 Verdugo-Urquidez, 494 U.S. at 273 (rejecting nonresident alien's reliance on Graham).

20 That the President's order applies to lawful, resident aliens as well as non-resident
21 aliens makes no difference. As a nonresident alien, Hamdan has no standing to allege an
22 equal protection violation on behalf of that distinct group. See Lujan v. Defenders of
23 Wildlife, 504 U.S. 555, 560 (1992) ("[T]he plaintiff must have suffered an 'injury in fact' –
24 an invasion of a legally protected interest which is * * * concrete and particularized."); see
25 also Sabri v. United States, 124 S. Ct. 1941, 1948-1949 (2004) ("[W]e have recognized the
26 validity of facial attacks alleging overbreadth * * * in relatively few settings, and generally,
27 on the strength of specific reasons weighty enough to overcome our well-founded reticence.").
28 As a representative of the broader unprotected class of aliens, Hamdan's challenge would be

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1 subject to rational basis review. See, e.g., Dandridge v. Williams, 397 U.S. 471, 485 (1970);
2 United States v. Carolene Products, 304 U.S. 144, 152 (1938). Under that standard, the
3 Military Order must be upheld as long as a court can identify any rational basis for it.
4 Carolene Products, 304 U.S. at 152. Given that the “[e]xecutive power over enemy aliens *
5 * * has been deemed throughout our history, essential to war-time security,” Eisentrager, 339
6 U.S. at 774, it cannot seriously be argued that the President’s action, taken in response to
7 attacks executed by a foreign-based terrorist organization, lacks a rational basis.

8 Moreover, courts have only applied heightened scrutiny to policies regarding aliens that
9 are promulgated by states, as opposed to the federal government. Griffiths and Graham, the
10 two cases on which petitioner principally relies, dealt respectively with Connecticut’s bar
11 admission rules and Arizona and Pennsylvania’s distribution of welfare benefits. In these and
12 other cases involving state action, the Court has made it clear that federal policies regarding
13 aliens are entitled to a much higher degree of deference. See, e.g., Graham, 413 U.S. at 379-
14 80; Plyler, 457 U.S. at 225.

15 Indeed, cases considering federal policies that differentiate against aliens are marked by
16 the Court’s extreme deference towards the political branches. In Mathews v. Diaz, 426 U.S.
17 67 (1976), the Court expressly distinguished state and federal actions for purposes of equal
18 protection doctrine relating to aliens, id. at 84-85, explaining that the relationship between the
19 United States and aliens “has been committed to the political branches of the Federal
20 Government,” id. at 81. The Court went on to apply great deference in upholding a federal
21 law that differentiated against aliens for purposes of determining eligibility for Medicare
22 benefits. A host of other cases echo Mathews’s judicial deference toward federal policies
23 governing aliens. See, e.g., Fiallo v. Bell, 430 U.S. 787, 792 (1977); Shaughnessy v. United
24 States ex rel. Mezei, 345 U.S. 206, 210 (1953); Harisiades v. Shaughnessy, 342 U.S. 580,
25 588-589 (1952). The concern motivating the Court’s deference – that regulation of aliens is
26 committed to the political branches of the federal government – is magnified in this case,
27 where the President’s Military Order not only regulates aliens, but does so in order to
28

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1 prosecute the war against international terrorism effectively. See, e.g., Dep't of the Navy v.
2 Egan, 484 U.S. 518, 530 (1988) ("courts traditionally have been reluctant to intrude upon the
3 authority of the Executive in military and national security affairs"). Accordingly, the
4 heightened scrutiny that would apply to state actions differentiating against lawful resident
5 aliens does not apply to the President's exercise of his war powers.

6
7 2. The Military Order Does Not Discriminate In The Allocation Of
8 Fundamental Rights.

9 Petitioner's final equal protection argument (Mem. 64) is that the Military Order
10 violates the Fifth Amendment because it discriminates in the allocation of fundamental rights.
11 The Court's jurisprudence makes clear, however, that heightened scrutiny is applied only to
12 the differential allocation of constitutionally guaranteed rights. See San Antonio Independent
13 School Dist. v. Rodriguez, 411 U.S. 1, 32-33 (1973). Because it is well established that
14 enemy combatants— the only individuals subject to trial by military commission— possess no
15 constitutional right to be tried for their war crimes in front of an Article III court, see Ex parte
16 Quirin, 317 U.S. 1 (1942) (citizen and alien enemy combatants alike are subject to trial by
17 military commission); Yamashita v. Styer, 327 U.S. 1 (1946) (alien enemy combatant), the
18 line of cases on which petitioner relies, see Pet.'s Mem. at 65, is inapposite. Thus, while the
19 Military Order would survive the most exacting scrutiny, it need only have a rational basis, as
20 it undoubtedly does.

21 C. The President's Order Does Not Violate 42 U.S.C. § 1981.

22 Petitioner's argument (Mem. 67-68) that the Military Order violates 42 U.S.C. § 1981
23 is equally meritless. Petitioner relies on a 1974 Ninth Circuit case holding that Section 1981
24 applied to federal action, Bowers v. Campbell, 505 F.2d 1155, but that case was decided
25 before the law was amended in 1991. The 1991 amendment provides that "[t]he rights
26 protected by this section are protected against impairment by nongovernmental discrimination
27 and impairment under color of State law." 42 U.S.C. § 1981(c) (emphasis added). This
28 amendment renders Section 1981 facially inapplicable to federal action. For this reason,

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every federal court of appeals that has considered the issue since the law was amended has held that federal actions cannot give rise to claims under Section 1981. See Davis-Warren Auctioneers, J.V. v. F.D.I.C., 215 F.3d 1159, 1161 (10th Cir. 2000); Davis v. United States Dep't of Justice, 204 F.3d 723, 725-726 (7th Cir. 2000); Lee v. Hughes, 145 F.3d 1272, 1277 (11th Cir. 1998). Petitioner cites a single post-amendment district court case to the contrary, La Compania Ocho, Inc. v. United States Forest Serv., 874 F. Supp. 1242 (D. N.M. 1995), but that case was overruled by Davis-Warren.

Even if Section 1981 did apply to the federal government, the Supreme Court has held (in the context of state action, of course) that the section is co-extensive with the Equal Protection Clause. See Grutter v. Bollinger, 539 U.S. 306, 343 (2003); General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 389-391 (1982). Petitioner's Section 1981 claim thus would fail for the same reasons that doom his constitutional equal protection challenge.

V. THE MILITARY COMMISSION THAT WILL TRY HAMDAN DOES NOT VIOLATE SEPARATION OF POWERS

When he issued the Military Order, the President invoked not only his authority as Commander in Chief, but also the authority granted him by Congress in the Authorization for Use of Military Force (AUMF) and the authority Congress recognized he had in Sections 821 and 836 of Title 10 of the United States Code. In Hamdi, the Court made clear that the AUMF authorizes the President to exercise "against individuals Congress sought to target in passing the AUMF" his traditional war powers, including "the capture, detention, and trial of enemy combatants." 124 S. Ct. at 2640 (plurality opinion) (citing Ex parte Quirin, 317 U.S. at 28); id. at 2679 (Thomas, J., dissenting) ("Congress has authorized the President" to "detain those arrayed against our troops"). As someone charged with, inter alia, delivering weapons, ammunition and other supplies to al Qaida members and associates, Hamdan, like Hamdi, falls squarely within the cross-hair of the AUMF.

Not only has Congress authorized the President generally to exercise his war powers

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1 against Hamdan, but it has specifically recognized and approved the President's exercise of
2 his authority to convene military commissions to try persons such as Hamdan who are charged
3 with committing offenses cognizable under the common law of war. Indeed, as the Supreme
4 Court held in both Ex parte Quirin and Yamashita, Congress has done so through the very
5 provisions of the Uniform Code of Military Justice that the President cited in the Military
6 Order.

7 Congress' longstanding decision both to recognize and approve the exercise of the
8 President's wartime authority to convene military commissions to try violations of the laws of
9 war reflects Congress' understanding that military exigencies require providing the President
10 flexibility rather than detailed procedures in dealing with enemy fighters. That decision is
11 entitled to just as much deference as Congress' decision to legislate detailed rules for the
12 military's use of courts-martial. As Justice Jackson has explained, "[w]hen the President acts
13 pursuant to an express or implied authorization of Congress, his authority is at its maximum,
14 for it includes all that he possesses in his own right plus all that Congress can delegate."
15 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-636 (1952) (Jackson, J.,
16 concurring). In these circumstances, the President's action is "'supported by the strongest
17 presumptions and the widest latitude of judicial interpretation, and the burden of persuasion
18 would rest heavily upon any who might attack it.'" Dames & Moore v. Regan, 453 U.S. 654,
19 674 (1981) (quoting Youngstown, 343 U.S. at 637 (Jackson, J., concurring)). Hamdan could
20 not possibly meet his burden, because he does not have any constitutional rights and even if he
21 did, the Supreme Court has already squarely rejected the arguments he advances here.

22 A. Hamdan Cannot Invoke Structural Protections Of Our Constitution.

23 Hamdan has no standing to claim a separation-of-powers violation. As a non-resident
24 alien with no voluntary connections to the United States, Hamdan possesses no constitutional
25 rights. See Part IV(A), supra. He thus may allege neither infringements of individual rights
26 expressly recognized by the Constitution nor infringements of rights derived from the
27 structural protections built into the Constitution.

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1 B. Congress Has Authorized The Military Commission Which Will Try
2 Hamdan.

3 The whole premise of petitioner's separation-of-powers argument, that "the tribunals at
4 issue here were created solely by virtue of an Executive order, without congressional
5 authorization" (Pet.'s Mem. 43), is without foundation. When the President issued the
6 Military Order establishing military commissions to try individuals such as Hamdan for
7 violations of the laws of war and other offenses triable by military commission, he expressly
8 relied not only on his powers as Commander in Chief,²⁵ but also on, inter alia, 10 U.S.C. §
9 821. That section, which is entitled "Jurisdiction of courts-martial not exclusive," states that
10 "[t]he provisions of this chapter conferring jurisdiction upon courts-martial do not deprive
11 military commissions * * * of concurrent jurisdiction with respect to offenders or offenses that
12 by statute or by the law of war may be tried by military commissions." 10 U.S.C. § 821
13 (emphasis added). That language originated in Article 15 of the Articles of War, which was
14 enacted in 1916. See Act of August 29, 1916, 39 Stat. 619, 653. At that time, Congress had
15 decided to extend the jurisdiction of courts-martial to all offenses against the laws of war.
16 The main proponent of Article 15 testified that, in light of the extension of courts-martial
17 jurisdiction, it was important to make clear that the military commissions' "common law of
18 war jurisdiction was not ousted." S. Rep. No. 63-229, at 53 (1914) (testimony of Judge
19 Advocate General Crowder before the House Committee on Military Affairs); see also S.
20 Rep. No. 64-130, at 40 (1916) (the military commission "is our common-law war court" that
21 "has no statutory existence").

22 When the Supreme Court addressed challenges to the many military commissions
23 convened during and after World War II, it agreed with General Crowder's view about the
24 place military commissions occupied in our legal system, construing Article 15 as

25 _____
26 ²⁵ As we discuss below, the President could have relied on his Commander-in-Chief
27 powers alone, but this Court need not resolve that question because the Supreme Court has
28 squarely held that the federal law on which the President relied constitutes congressional
authorization for military commissions.

1 congressional recognition and approval of the common-law role military commissions play
2 during wartime in punishing violations of the laws of war.²⁶ In Ex Parte Quirin, 317 U.S. 1
3 (1942), the Court expressly held that Article 15 – whose language is identical to today’s
4 Section 821 – “authorized trial of offenses against the laws of war before such commissions.”
5 Id. at 29 (emphasis added); id. at 28 (“By the Articles of War, and especially Article 15,
6 Congress has explicitly provided, so far as it may constitutionally do so, that military
7 commissions shall have jurisdiction to try offenders or offenses against the law of war * * *”).
8 The Quirin Court held not only that Congress had authorized the President to use military
9 commissions, but also that Congress did not purport to codify violations of the laws of war
10 over which the commissions could exercise jurisdiction. Rather, “Congress has incorporated
11 by reference, as within the jurisdiction of military commissions, all offenses which are defined
12 as such by the laws of war.” Id. at 30; id. at 35 (relying on the “long course of practical
13 administrative construction by [the] military authorities”). Applying these principles, the
14 Court approved the military commission’s exercise of jurisdiction over the Nazi saboteurs for
15 alleged offenses against the common law of war.

16 Recognizing that Quirin undoes his entire separation-of-powers argument, petitioner
17 attempts to distinguish it on various grounds, none of which has any merit. Petitioner
18 contends that Quirin is different because the charges there “were explicitly authorized by
19 Congress,” Pet.’s Mem. 48. That argument ignores the very holding of the decision and the
20 Court’s application of that holding to the first charge leveled against the saboteurs, which
21 alleged “[v]iolation of the [common] law of war,” 317 U.S. at 23, not an offense prescribed
22 by Congress.²⁷ The Court explained that the whole point of Article 15 was congressional
23

24 ²⁶ In Ex Parte Quirin, the Court discussed the rich history in the United States of military
25 commissions’ use during wartime, including during the Revolutionary War, the Mexican-
American War, and the Civil War. 317 U.S. 1, 32 n.10, 42 n.14 (1942).

26 ²⁷ Petitioner emphasizes (Mem. 48-49) that charges 2 and 3 were explicitly authorized by
27 Congress, but the Quirin Court upheld the military commission’s authority to try petitioners
28 based solely on charge 1. The fact that the Court limited its analysis to the charge that relied
on the common law, rather than on the statutory charges, demonstrates the degree to which

1 recognition and approval of the military's enforcement of a body of common law governing
2 the rules of warfare that Congress did not purport to codify:

3 Congress has incorporated by reference, as within the jurisdiction of military
4 commissions, all offenses which are defined as such by the law of war * * *, and which
5 may constitutionally be included within that jurisdiction. Congress had the choice of
6 crystallizing in permanent form and in minute detail every offense against the law of
7 war, or of adopting the system of common law applied by military tribunals so far as it
8 should be recognized and deemed applicable by the courts. It chose the latter course.

9 Id. at 30 (citation omitted).

10 The Quirin Court went on to assess whether the saboteurs had been charged with "an
11 offense against the law of war cognizable before a military tribunal." Id. at 29. In doing so,
12 the Court did not look to federal statutes, but rather, to other cases tried before military
13 commissions, id. at 31 nn.9 & 10 (discussing cases of confederate soldiers and officers
14 convicted for hostile actions in civilian dress or other disguises, including attempts to derail a
15 train and to set fire to New York City); contemporary secondary sources on military and
16 international law, id. at 31; and the Rules of Land Warfare promulgated by the War
17 Department for the guidance of the Army,²⁸ id. at 33-34. After canvassing these sources, the
18 Court concluded that the Nazi saboteurs were properly charged with a violation of the law of
19 war because, "[b]y a long course of practical administrative construction by its military
20 authorities, our Government has likewise recognized that those who during time of war pass
21 surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for
22 the commission of hostile acts involving destruction of life or property, have the status of
23 unlawful combatants punishable as such by military commission." Id. at 35 (emphasis added).
24 Contrary to petitioner's argument, the Court never implied, much less stated, that the alleged

25 _____
26 petitioner misreads Quirin.

27 ²⁸ The Court cited provisions of the Rules of Land Warfare identifying persons subject to
28 military trial for violations of the laws of war, including "'persons who take up arms and
commit hostilities' without having the means of identification prescribed for belligerents." Id.
at 34 (quoting Paragraph 348). The Court observed that "the specified violations [in the
Rules] are intended to be only illustrative of the applicable principles of the common law of
war, not "an exclusive enumeration." Ibid.

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1 violation of the law of war was cognizable because it was defined by Congress or because it
2 resembled a statutory offense.

3 Given the total absence of evidence in Quirin that the Court approved the first charge
4 based on explicit statutory authorization, petitioner looks outside Quirin to the statement in
5 Madsen, that ““the military commission’s conviction of saboteurs * * * was upheld on charges
6 of violating the law of war as defined by statute’.” Pet’s Mem. 49 (emphasis in Mem.). A
7 review of the pages in Quirin which Madsen cited indicates that what the Madsen Court meant
8 was nothing more than what the Quirin Court held, namely, that Congress, via Article 15,
9 acted to define the law of war as incorporating the body of common law applied by military
10 commissions. See Quirin, 317 U.S. at 38 (the “Act of Congress [Article 15], by
11 incorporating the law of war, punishes” violation of common law of war) (emphasis added);
12 id. at 28 (“Congress * * * has thus exercised its authority to define and punish offenses
13 against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of
14 military commissions to try persons for offenses which, according to the rules and precepts of
15 the law of nations, and more particularly the law of war, are cognizable by such tribunals.”)
16 (emphasis added).

17 Respondents’ reading of Quirin is confirmed by Yamashita v. Styer, 327 U.S. 1
18 (1946), which is not discussed in petitioner’s separation-of-powers argument. In Yamashita,
19 the Court characterized Quirin as holding that

20 [Congress] had not attempted to codify the law of war or to mark its precise
21 boundaries. Instead, by Article 15 it had incorporated, by reference, as within the
22 preexisting jurisdiction of military commissions created by appropriate military
23 command, all offenses which are defined as such by the law of war, and which may
24 constitutionally be included within that jurisdiction. It thus adopted the system of
25 military common law applied by military tribunals so far as it should be recognized and
26 deemed applicable by the courts, and as further defined and supplemented by the Hague
27 Convention, to which the United States and the Axis powers were parties.

28 327 U.S. at 11 (emphasis added). Petitioner’s revisionist take on Quirin thus cannot be
reconciled with the Yamashita Court’s own interpretation and application of Quirin four years
later.

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RE 14
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1 Under Quirin, there can be no doubt that Hamdan is charged with an offense that
2 alleges a violation of the laws of war. He is charged with conspiring with an international
3 terrorist organization that has carried out numerous attacks – including the September 11
4 attacks – that violate every precept of the laws of war.²⁹ Indeed, those attacks targeted
5 civilians and were carried out by enemy forces disguised as civilians who did not carry arms
6 openly. See id. at 34. And the particular offenses Hamdan is charged with conspiring to
7 commit – attacking civilians, attacking civilian objects, murder by an unprivileged
8 belligerent, destruction of property by an unprivileged belligerent, and terrorism – implicate
9 the most basic protections of the laws of war. See 32 C.F.R. §§ 11.6(a)(2) and (a)(3);
10 §§11.6(b)(2), (b)(3), and (b)(4); Yamashita, 327 U.S. at 17 (“Obviously charges of violations
11 of the law of war triable before a military tribunal need not be stated with the precision of a
12 common law indictment.”).

13 Both the military’s own field manual and the 1907 Hague Convention – two sources
14 on which the Quirin Court heavily relied – confirm that the charge against Hamdan
15 constitutes an offense against the customary laws of war. The Field Manual declares that
16 “[c]ustomary international law prohibits the launching of attacks * * * against either the
17 civilian population as such or individual civilians” and that “[t]he attack or bombardment, by
18 whatever means, of towns, villages, dwellings, or buildings which are undefended is
19 prohibited.” Dep’t of the Army, Field Manual 27-10, The Law of Land Warfare ¶¶ 39-40;
20 see also Hague Convention No. IV of October 18, 1907, 36 Stat. 2295, art. 23 (stating that “it
21 is especially forbidden” both “[t]o kill or wound an enemy who [has] laid down his arms, or
22 [has] no longer means of defense,” and “[t]o destroy or seize the enemy’s property, unless
23 such destruction or seizure be imperatively demanded by the necessities of war.”). The
24

25 ²⁹ The President, the Congress, and NATO have all recognized al Qaida’s attacks as an
26 act of war. See Military Order, § 1(a); AUMF, 115 Stat. 224; and Statement of NATO Secy.
27 Gen. (Oct. 2, 2001) (available at <http://usinfo.-state.gov.topical/pol/terror/01100205.htm>). In
28 any event, whether there exists a state of armed conflict to which the laws of war apply is a
political question for the President, not the courts. See The Prize Cases, 67 U.S. (2 Black)
635, 670 (1862); Eisentrager, 339 U.S. at 789; Ludecke v. Watkins, 335 U.S. 160, 170
(1948).

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1 manual further provides that individuals “who take up arms and commit hostile acts without
2 having complied with the conditions prescribed by the laws of war for recognition as
3 belligerents” are not entitled to combatant immunity for their hostile acts, but rather “may be
4 tried and sentenced to execution or imprisonment.” *Id.* ¶ 80. See also *Yamashita*, 327 U.S.
5 at 14 (recognizing as violation of the law of war “deliberate plan and purpose to massacre and
6 exterminate a large part of the civilian population * * * and to devastate and destroy public,
7 private and religious property”); GPW art. 4 (extending POW protections only to lawful
8 belligerents). Under these common law sources, the charge against Hamdan – implicating
9 him in al Qaida’s attacks on the United States – “plainly alleges violation of the law of
10 war.”³⁰ *Quirin*, 317 U.S. at 36.

11 Petitioner’s attempt (Mem. 51-54) to distinguish *Quirin* on the basis of the declaration
12 of war there is equally unavailing. Congress authorized the President to “use all necessary
13 and appropriate force against those nations, organizations, or persons he determines planned,
14 authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, * *
15 * in order to prevent any future acts of international terrorism against the United States[.]”
16 Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001).

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21 ³⁰ Petitioner (Pet.’s Mem. 43-47) misplaces reliance on *Ex parte Milligan*, 71 U.S. (4
22 Wall.) 2 (1866). To begin with, *Milligan*, which involved the military prosecution of an
23 American citizen, was not a separation-of-powers case, for the Court held there that the
24 government as a whole had no power to subject Milligan to military jurisdiction. *Id.* at 122.
25 Moreover, *Quirin* “construe[d]” the “inapplicability of the law of war to Milligan’s case as
26 having particular reference to the facts,” namely, that Milligan, as a person neither “a part of
27 or associated with the armed forces of the enemy, was a non-belligerent.” 317 U.S. at 19; see
28 also *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (military tribunal cannot try persons for
embezzling stock or brawling with soldiers). Finally, when addressing the application of the
laws of war to the current armed conflict, a majority of the Supreme Court embraced *Quirin*,
not *Milligan*, as the controlling precedent. *Hamdi*, 124 S. Ct. at 2643 (plurality opinion)
 (“*Quirin* was a unanimous opinion. It both postdates and clarifies *Milligan*[.]”); *ibid.*
 (rejecting a reading of *Quirin* that would limit application of its principles to cases where
 enemy combatant status is conceded); *id.* at 2682 (Thomas, J.) (“*Quirin* overruled *Milligan* to
 the extent those cases are inconsistent.”).

1 In Hamdi, a plurality of the Court ruled that this authorization triggered the exercise of the
2 President's traditional war powers, in particular, the power to detain enemy combatants.³¹
3 The Court explained that "detention of individuals [that Congress sought to target in passing
4 the AUMF] * * *, for the duration of the particular conflict in which they were captured, is so
5 fundamental and accepted an incident to war as to be an exercise of the 'necessary and
6 appropriate force' Congress has authorized the President to use." 124 S. Ct. at 2640
7 (plurality opinion). That ruling applies with equal force to the President's power to punish
8 war criminals. Indeed, the Hamdi Court justified its own conception of the President's war
9 powers by expressly relying on Quirin for the proposition that "[t]he capture and detention of
10 lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal
11 agreement and practice,' are 'important incident[s] of war.'" Hamdi, 124 S. Ct. at 2640
12 (quoting Quirin, 317 U.S. at 28) (emphasis added). Because al Qaida is the central target of
13 the AUMF, Congress has clearly authorized the President to exercise his war powers by
14 subjecting to military trial individuals such as Hamdan who are charged with conspiring to
15 achieve its goals.³²

16 The absence of a formal declaration of war is likewise immaterial to application of the
17 substantive prohibitions of the UCMJ. It is well settled that the UCMJ applies to armed
18 conflicts that the United States has prosecuted without a formal declaration of war.
19 See, e.g., United States v. Anderson, 38 C.M.R. 386, 386 (C.M.A. 1968) ("The current
20 military involvement of the United States in Vietnam undoubtedly constitutes a 'time of war'

21 _____
22 ³¹ The plurality's ruling on this important point enjoys majority support, given Justice
23 Thomas's position in dissent. See Hamdi, 124 S. Ct. at 2679 (Thomas, J., dissenting)
24 ("Although the President very well may have inherent authority to detain those arrayed against
our troops, I agree with the plurality that we need not decide that question because Congress
has authorized the President to do so.").

25 ³² The Hamdi Court's ruling reflects the longstanding principle that the President's
26 prerogative to invoke the laws of war in a time of armed conflict, including in respect to the
27 punishment of war criminals, in no way turns on a formal declaration. See, e.g., The Prize
28 Cases, 67 U.S. (2 Black) 635, 668, 670 (1862); J. Ely, War and Responsibility 25 (1993) (the
suggestion "that congressional combat authorizations must actually be labeled 'declarations of
war'" is "manifestly out of accord with the specific intent of the founders").

1 in that area, within the meaning of Article 43"); United States v. Bancroft, 11 C.M.R. 3, 5
2 (C.M.A. 1953) ("a finding that this is a time of war, within the meaning of the language of
3 the Code, is compelled by the very nature of the present conflict" in Korea). The cases that
4 petitioner cites to the contrary, United States v. Averette, 41 C.M.R. 363, 365 (C.M.A.
5 1970), and Zamora v. Woodson, 42 C.M.R. 5 (C.M.A. 1970), hold that a formal declaration
6 of war is necessary only before the UCMJ is applied to civilians, and are thus inapplicable to
7 Hamdan, an alien captured in Afghanistan in the ongoing armed conflict and determined by
8 the military to be an enemy combatant.

9 Finally, contrary to petitioner's contention, Quirin has not been eroded by subsequent
10 legal developments. Hamdi reconfirms Quirin. 124 S. Ct. at 2643 (plurality opinion); id. at
11 2682 (Thomas, J., dissenting). Petitioner cites the codification of the UCMJ, but Congress
12 expressly stated that the codification preserved the holding of Quirin. See S. Rep. No. 486,
13 81st Cong, 1st Sess. 13 (1949); H.R. Rep. No. 491, 81st Cong, 1st Sess. 17 (1949). As for the
14 Geneva Conventions, as discussed above in Part III, they are not self-executing, do not apply,
15 and, in any event, approve the military trial of unlawful combatants, see, e.g., S. Exec. Rep.
16 No. 84-9, at 5 ("guerilla[s] * * * remain subject to trial and punishment as unlawful
17 belligerents"). And the War Crimes Act of 1996 and Expanded War Crimes Act of 1997
18 were intended to supplement rather than replace the jurisdiction of military commissions over
19 war crimes. Indeed, Congress could not have been clearer on this score. The War Crimes Act
20 itself says nothing about altering the traditional jurisdiction of military commissions. That is
21 not surprising, given that "[t]he enactment of H.R. 3680 [the War Crimes Act of 1996] is not
22 intended to affect in any way the jurisdiction of any court-martial, military commission, or
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1 other military tribunal under any article of the Uniform Code of Military Justice or under the
2 law of war or the law of nations.” H. Rep. No. 698, 104th Cong. 2d Sess. 12 (1996).³³
3 Because Congress clearly did not intend to “occup[y] the field” (Pet.’s Mem. 72) previously
4 occupied by military commissions, the subject matter jurisdiction of those commissions today
5 is no narrower than it was during World War II. To the contrary, that jurisdiction remains
6 broad enough to cover violations of the laws of armed conflict as defined by both historical
7 and contemporary standards.³⁴

8
9 C. The President Has The Inherent Authority To Create Military
10 Commissions.

11 Even if the legislative provisions the President expressly invoked did not constitute the
12 congressional authorization that the Supreme Court has held they constitute, see Hamdi
13 (construing AUMF), supra; Quirin (construing precursor to 10 U.S.C. § 821), the military
14 commissions would still be constitutional. That is because the President’s authority to create
15 military commissions is inherent in his position as Commander-in-Chief. U.S. Const. Art. II
§ 2.

16 The Executive Branch’s war power has always included the unilateral authority to
17 create military commissions, because that authority is necessary to effectuate the war power.
18 As the Court explained in Eisentrager, “[t]he first of the enumerated powers of the President
19 is that he shall be Commander-in-Chief of the Army and Navy of the United States. And, of
20 course, grant of war power includes all that is necessary and proper for carrying these powers
21

22 ³³ Military commissions may, of course, try persons for violations of the laws of war even
23 if the underlying conduct could also be construed to violate criminal statutes. One of the Nazi
24 saboteurs in Quirin was an American citizen who could have been charged with treason, but
25 that fact did not negate his eligibility for trial by commission. 317 U.S. at 38. See also
Colepaugh v. Looney, 235 F.2d 429, 432-433 (10th Cir. 1956) (“an accused has no
constitutional right to choose the offense or the tribunal in which he will be tried”).

26 ³⁴ The Supreme Court has repeatedly held that the repeal by implication of an earlier
27 statute is disfavored. See, e.g., Rodriguez v. United States, 480 U.S. 522, 524 (1987).
28 Given that Congress made clear its intent not to repeal 10 U.S.C. § 821, the War Crimes Act
cannot be read to displace the traditional jurisdiction of military commissions to try violations
of the common law of war.

1 into execution.” 339 U.S. at 788 (citation omitted). That war power includes “the power * *
2 * to punish those enemies who violated the law of war.” Hirota, 338 U.S. at 208 (Douglas,
3 J., concurring) (citations omitted). And “punishment of war criminals” is an essential “part
4 of the prosecution of the war,” because it is “directed to a dilution of enemy power and [to]
5 retribution for wrongs done.” Id. at 208; see also Yamashita, 327 U.S. at 11 (“An important
6 incident to the conduct of war is the adoption of measures by the military commander, not
7 only to repel and defeat the enemy, but to seize and subject to disciplinary measures those
8 enemies who * * * have violated the law of war.”). Indeed, the laws of war exist to impose
9 limits on belligerent conduct; as leader of the armed forces, the President must have the
10 authority to enforce those limits to protect the nation.

11 The Executive Branch’s unilateral authority to create military commissions not only
12 necessarily inheres in the powers granted the President by the Constitution, but is also borne
13 out by historical practice. In 1780, during the Revolutionary War, General Washington as
14 Commander in Chief of the Continental Army appointed a “Board of General Officers” to try
15 the British Major Andre as a spy, see Quirin, 317 U.S. at 31 n.9, when there was no court-
16 martial authority to try him. See George B. Davis, A Treatise on the Military Law of the
17 United States 308 n.1 (1913). General Andrew Jackson similarly convened military trials in
18 1818 to try two English subjects for inciting the Creek Indians to war with the United States.
19 See William Winthrop, Military Law and Precedents 464, 832 (2d ed. 1920). In the Mexican
20 American War, General Winfield Scott appointed tribunals called “council[s] of war” to try
21 offenses under the laws of war and tribunals called “military commission[s]” to serve
22 essentially as occupation courts administering justice for occupied territory. See id. at 832-33;
23 Davis, supra at 308. And after the outbreak of the Civil War, military commissions were
24 convened to try offenses against the laws of war, see Davis, supra, at 308 n.2; Winthrop,
25 supra at 833.

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1 The Court has never called into question the validity of that historical practice. To the
2 contrary, in Ex parte Vallindigham, 68 U.S. 243 (1863), the Court, in the course of
3 concluding that it did not have jurisdiction to review the proceedings before a military
4 commission, explained that military jurisdiction can be “derived from the common law of
5 war.” Id. at 249. And the three seminal military commission cases, Milligan, Quirin, and
6 Yamashita, are all consistent with the position that the President does not require statutory
7 authorization to establish military commissions to try violations of the laws of war. As
8 mentioned above, Milligan is not a separation-of-powers case, and has been narrowly confined
9 to its facts. In Quirin, the Court, in light of its reliance on congressional authorization, simply
10 found it “unnecessary” to decide whether the President had unilateral authority. Finally, in
11 Yamashita, although the same statutes that were dispositive in Quirin on the question of
12 congressional authorization were still in force (as they are now), the Court strongly suggested
13 that the President has inherent authority to convene military commissions. The Court
14 observed that the Articles of War “recognized the ‘military commission’ appointed by military
15 command, as it had previously existed in United States Army practice, as an appropriate
16 tribunal for the trial and punishment of offenses against the law of war.” Yamashita, 327
17 U.S. at 5 (emphasis added). The Court further explained that “[a] military commission is our
18 commonlaw war court. It has no statutory existence, though it is recognized by statute law.”
19 Id. at 20 n.7 (quoting General Crowder). The logical implication is that even without Article
20 15 or any other statute, the President can create commissions on the basis of his inherent
21 authority as Commander-in-Chief. See also Madsen, 343 U.S. at 346-347 (“Since our
22 nation’s earliest days, [military] commissions have been constitutionally recognized agencies
23 for meeting many urgent governmental responsibilities related to war. They have taken many
24 forms and borne many names. Neither their procedure nor their jurisdiction has been
25 prescribed by statute.”).

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1 **CONCLUSION**

2 For the reasons stated above, respondents respectfully request that the petition be
3 denied, that their cross-motion to dismiss be granted, and that a judgment of dismissal be
4 entered in favor of respondents.

5 DATED this 6th day of August, 2004.

6 Respectfully submitted,

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8 United States Attorney

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(C04-0777RSL)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington, and is a person of such age and discretion as to be competent to serve papers;

That on August 6, 2004, she electronically filed the Notice of Motion and Respondents' Cross-Motion to Dismiss; Consolidated Return to Petition and Memorandum of Law in Support of Cross-Motion to Dismiss with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participant(s):

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I further certify that on the same date, I caused to be mailed by United States Postal Service, the above document to the following non-CM/ECF participant(s):

Charles Davidson Swift
Office of the Chief Defense Counsel for Military Commissions
1851 South Bell Street, Suite 103
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Dated this 6th day of August, 2004.

s/ Laurie A. Gausta
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DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

- 7 JUL 2004

MEMORANDUM FOR THE SECRETARY OF THE NAVY

SUBJECT: Order Establishing Combatant Status Review Tribunal

This Order applies only to foreign nationals held as enemy combatants in the control of the Department of Defense at the Guantanamo Bay Naval Base, Cuba ("detainees").

a. Enemy Combatant. For purposes of this Order, the term "enemy combatant" shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces. Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense.

b. Notice. Within ten days after the date of this Order, all detainees shall be notified of the opportunity to contest designation as an enemy combatant in the proceeding described herein, of the opportunity to consult with and be assisted by a personal representative as described in paragraph (c), and of the right to seek a writ of habeas corpus in the courts of the United States.

c. Personal Representative. Each detainee shall be assigned a military officer, with the appropriate security clearance, as a personal representative for the purpose of assisting the detainee in connection with the review process described herein. The personal representative shall be afforded the opportunity to review any reasonably available information in the possession of the Department of Defense that may be relevant to a determination of the detainee's designation as an enemy combatant, including any records, determinations, or reports generated in connection with earlier determinations or reviews, and to consult with the detainee concerning that designation and any challenge thereto. The personal representative may share any information with the detainee, except for classified information, and may participate in the Tribunal proceedings as provided in paragraph (g)(4).

d. Tribunals. Within 30 days after the detainee's personal representative has been afforded the opportunity to review the reasonably available information in the possession of the Department of Defense and had an opportunity to consult with the detainee, a Tribunal shall be convened to review the detainee's status as an enemy combatant.

e. Composition of Tribunal. A Tribunal shall be composed of three neutral commissioned officers of the U.S. Armed Forces, each of whom possesses the appropriate security clearance and none of whom was involved in the apprehension,



detention, interrogation, or previous determination of status of the detainee. One of the members shall be a judge advocate. The senior member (in the grade of O-5 and above) shall serve as President of the Tribunal. Another non-voting officer, preferably a judge advocate, shall serve as the Recorder and shall not be a member of the Tribunal.

f. Convening Authority. The Convening Authority shall be designated by the Secretary of the Navy. The Convening Authority shall appoint each Tribunal and its members, and a personal representative for each detainee. The Secretary of the Navy, with the concurrence of the General Counsel of the Department of Defense, may issue instructions to implement this Order.

g. Procedures.

(1) The Recorder shall provide the detainee in advance of the proceedings with notice of the unclassified factual basis for the detainee's designation as an enemy combatant.

(2) Members of the Tribunal and the Recorder shall be sworn. The Recorder shall be sworn first by the President of the Tribunal. The Recorder will then administer an oath, to faithfully and impartially perform their duties, to all members of the Tribunal to include the President.

(3) The record in each case shall consist of all the documentary evidence presented to the Tribunal, the Recorder's summary of all witness testimony, a written report of the Tribunal's decision, and a recording of the proceedings (except proceedings involving deliberation and voting by the members), which shall be preserved.

(4) The detainee shall be allowed to attend all proceedings, except for proceedings involving deliberation and voting by the members or testimony and other matters that would compromise national security if held in the presence of the detainee. The detainee's personal representative shall be allowed to attend all proceedings, except for proceedings involving deliberation and voting by the members of the Tribunal.

(5) The detainee shall be provided with an interpreter, if necessary.

(6) The detainee shall be advised at the beginning of the hearing of the nature of the proceedings and of the procedures accorded him in connection with the hearing.

(7) The Tribunal, through its Recorder, shall have access to and consider any reasonably available information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any reasonably available records, determinations, or reports generated in connection therewith.

(8) The detainee shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal. The Tribunal shall determine the

reasonable availability of witnesses. If such witnesses are from within the U.S. Armed Forces, they shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would affect combat or support operations. In the case of witnesses who are not reasonably available, written statements, preferably sworn, may be submitted and considered as evidence.

(9) The Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issue before it. At the discretion of the Tribunal, for example, it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances. The Tribunal does not have the authority to declassify or change the classification of any national security information it reviews.

(10) The detainee shall have a right to testify or otherwise address the Tribunal in oral or written form, and to introduce relevant documentary evidence.

(11) The detainee may not be compelled to testify before the Tribunal.

(12) Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine in closed session by majority vote whether the detainee is properly detained as an enemy combatant. Preponderance of evidence shall be the standard used in reaching this determination, but there shall be a rebuttable presumption in favor of the Government's evidence.

(13) The President of the Tribunal shall, without regard to any other provision of this Order, have authority and the duty to ensure that all proceedings of or in relation to the Tribunal under this Order shall comply with Executive Order 12958 regarding national security information.

h. The Record. The Recorder shall, to the maximum extent practicable, prepare the record of the Tribunal within three working days of the announcement of the Tribunal's decision. The record shall include those items described in paragraph (g)(3) above. The record will then be forwarded to the Staff Judge Advocate for the Convening Authority, who shall review the record for legal sufficiency and make a recommendation to the Convening Authority. The Convening Authority shall review the Tribunal's decision and, in accordance with this Order and any implementing instructions issued by the Secretary of the Navy, may return the record to the Tribunal for further proceedings or approve the decision and take appropriate action.

i. Non-Enemy Combatant Determination. If the Tribunal determines that the detainee shall no longer be classified as an enemy combatant, the written report of its decision shall be forwarded directly to the Secretary of Defense or his designee. The Secretary or his designee shall so advise the Secretary of State, in order to permit the Secretary of State to coordinate the transfer of the detainee for release to the detainee's

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country of citizenship or other disposition consistent with domestic and international obligations and the foreign policy of the United States.

j. This Order is intended solely to improve management within the Department of Defense concerning its detention of enemy combatants at Guantanamo Bay Naval Base, Cuba, and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law, in equity, or otherwise by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

k. Nothing in this Order shall be construed to limit, impair, or otherwise affect the constitutional authority of the President as Commander in Chief or any authority granted by statute to the President or the Secretary of Defense.

This Order is effective immediately.

A handwritten signature in black ink, appearing to read "Paul W. Wolfowitz", followed by a horizontal line.



THE SECRETARY OF THE NAVY
WASHINGTON, D.C. 20350-1000

29 July 2004

MEMORANDUM FOR DISTRIBUTION

Subj: Implementation of Combatant Status Review Tribunal
Procedures for Enemy Combatants detained at Guantanamo
Bay Naval Base, Cuba

Ref: (a) Deputy Secretary of Defense Order of July 7, 2004
(b) Convening Authority Appointment Letter of
July 9, 2004

Encl: (1) Combatant Status Review Tribunal Process
(2) Recorder Qualifications, Roles and Responsibilities
(3) Personal Representative Qualifications, Roles and
Responsibilities
(4) Combatant Status Review Tribunal Notice to Detainees
(5) Sample Detainee Election Form
(6) Sample Nomination Questionnaire
(7) Sample Appointment Letter for Combatant Status Review
Tribunal Panel
(8) Combatant Status Review Tribunal Hearing Guide
(9) Combatant Status Review Tribunal Decision Report
Cover Sheet

1. Introduction

By reference (a), the Secretary of Defense has established a Combatant Status Review Tribunal (CSRT) process to determine, in a fact-based proceeding, whether the individuals detained by the Department of Defense at the U.S. Naval Base Guantanamo Bay, Cuba, are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation. The Secretary of the Navy has been appointed to operate and oversee this process.

The Combatant Status Review Tribunal process provides a detainee: the assistance of a Personal Representative; an interpreter if necessary; an opportunity to review unclassified information relating to the basis for his detention; the opportunity to appear personally to present reasonably available information relevant to why he should not be classified as an enemy combatant; the opportunity to question witnesses testifying at the Tribunal; and, to the extent they are

Subj: Implementation of Combatant Status Review Tribunal
Procedures for Enemy Combatants detained at Guantanamo
Bay Naval Base, Cuba

reasonably available, the opportunity to call witnesses on his behalf.

2. Authority

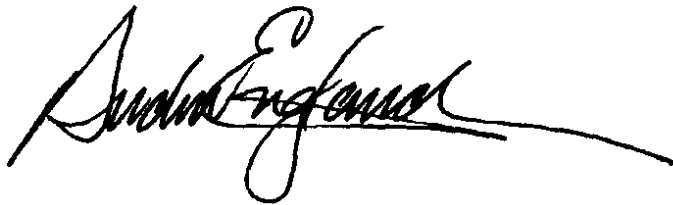
The Combatant Status Review Tribunal process was established by Deputy Secretary of Defense Order dated July 7, 2004 (reference (a)), which designated the undersigned to operate and oversee the Combatant Status Review Tribunal process. The Tribunals will be governed by the provisions of reference (a) and this implementing directive, which sets out procedures for Tribunals and establishes the position of Director, Combatant Status Review Tribunals. Reference (b) designates the Director, CSRT, as the convening authority for the Tribunal process.

3. Implementing Process

The Combatant Status Review Tribunal Process is set forth in enclosure (1). Enclosures (2) and (3) set forth detailed descriptions of the roles and responsibilities of the Recorder and Personal Representative respectively. Enclosure (4) is a Notice to detainees regarding the CSRT process. Enclosure (5) is a Sample Detainee Election Form. Enclosure (6) is a Sample Nominee Questionnaire for approval of Tribunal members, Recorders, and Personal Representatives. Enclosure (7) is an Appointment Letter that will be signed by the Director of CSRT as the convening authority. Enclosure (8) is a CSRT Hearing Guide. Tribunal decisions will be reported to the convening authority by means of enclosure (9). This implementing directive is subject to revision at any time.

CC:

Secretary of State
Secretary of Defense
Attorney General
Secretary of Homeland Security
Director, Central Intelligence Agency
Assistant to the President for National Security Affairs
Counsel to the President



Deputy Secretary of Defense
Secretary of the Army
Secretary of the Navy
Secretary of the Air Force
Chairman of the Joint Chiefs of Staff
Director, Federal Bureau of Investigation
Director of Defense Agencies
Director, DOD Office of Detainee Affairs

Combatant Status Review Tribunal Process

A. Organization

Combatant Status Review Tribunals (CSRT) will be administered by the Director, Combatant Status Review Tribunals. The Director will staff and structure the Tribunal organization to facilitate its operation. The CSRT staff will schedule Tribunal proceedings, provide for interpreter services, provide legal advice to the Director and to Tribunal panels, provide clerical assistance and other administrative support, ensure information security, and coordinate with other agencies as appropriate.

B. Purpose and Function

This process will provide a non-adversarial proceeding to determine whether each detainee in the control of the Department of Defense at the Guantanamo Bay Naval Base, Cuba, meets the criteria to be designated as an enemy combatant, defined in reference (a) as follows:

An "enemy combatant" for purposes of this order shall mean an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Each detainee whose status will be reviewed by a Tribunal has previously been determined, since capture, to be an enemy combatant through multiple levels of review by military officers and officials of the Department of Defense.

The Director, CSRT, shall convene Tribunals pursuant to this implementing directive to conduct such proceedings as necessary to make a written assessment as to each detainee's status as an enemy combatant. Each Tribunal shall determine whether the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant.

Adoption of the procedures outlined in this directive is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

C. Combatant Status Review Tribunal Structure

- (1) Each Tribunal shall be composed of a panel of three neutral commissioned officers of the U.S. Armed Forces convened to make determinations of enemy combatant status pursuant to this implementing directive. Each of the officers shall possess the appropriate security clearance and none of the officers appointed shall have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process. The senior member of each Tribunal shall be an officer serving in the grade of O-6 and shall be its President. The other members of the Tribunal shall be officers in the grade of O-4 and above. One of

the officers appointed to the Tribunal shall be a judge advocate. All Tribunal members have an equal vote as to a detainee's enemy combatant status.

- (2) **Recorder.** Each Tribunal shall have a commissioned officer serving in the grade of O-3 or above, preferably a judge advocate, appointed by the Director, CSRT, to obtain and present all relevant evidence to the Tribunal and to cause a record to be made of the proceedings. The Recorder shall have an appropriate security clearance and shall have no vote. The Recorder shall not have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process. The role and responsibilities of the Recorder are set forth in enclosure (2).
- (3) **Personal Representative.** Each Tribunal shall have a commissioned officer appointed by the Director, CSRT, to assist the detainee in reviewing all relevant unclassified information, in preparing and presenting information, and in questioning witnesses at the CSRT. The Personal Representative shall be an officer in the grade of O-4 or above, shall have the appropriate security clearance, shall not be a judge advocate, and shall have no vote. The Personal Representative shall not have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process. The role and responsibilities of the Personal Representative are set forth in enclosure (3).
- (4) **Legal Advisor.** The Director, CSRT, shall appoint a judge advocate officer as the Legal Advisor to the Tribunal process. The Legal Advisor shall be available in person, telephonically, or by other means, to each Tribunal as an advisor on legal, evidentiary, procedural or other matters. In addition, the Legal Advisor shall be responsible for reviewing each Tribunal decision for legal sufficiency. The Legal Advisor shall have an appropriate security clearance and shall have no vote. The Legal Advisor shall also not have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process.
- (5) **Interpreter.** If needed, each Tribunal will have an interpreter appointed by the President of the Tribunal who shall be competent in English and a language understood by the detainee. The interpreter shall have no vote and will have an appropriate security clearance.

D. Handling of Classified Material

- (1) All parties shall have due regard for classified information and safeguard it in accordance with all applicable instructions and regulations. The Tribunal, Recorder and Personal Representative shall coordinate with an Information Security Officer in the handling and safeguarding of classified material before, during and after the Tribunal proceeding.
- (2) The Director, CSRT, and the Tribunal President have the authority and duty to ensure that all proceedings of, or in relation to, a Tribunal under this Order shall comply with Executive Order 12958 regarding national security information in all respects. Classified information may be used in the CSRT process with the concurrence of the

originating agency. Classified information for which the originating agency declines to authorize for use in the CSRT process is not reasonably available. For any information not reasonably available, a substitute or certification will be requested from the originating agency as cited in paragraph E (3)(a) below.

- (3) The Director, CSRT, the CSRT staff, and the participants in the CSRT process do not have the authority to declassify or change the classification of any classified information.

E. Combatant Status Review Tribunal Authority

The Tribunal is authorized to:

- (1) Determine the mental and physical capacity of the detainee to participate in the hearing. This determination is intended to be the perception of a layperson, not a medical or mental health professional. The Tribunal may direct a medical or mental health evaluation of a detainee, if deemed appropriate. If a detainee is deemed physically or mentally unable to participate in the CSRT process, that detainee's case will be held as a Tribunal in which the detainee elected not to participate. The Tribunal President shall ensure that the circumstances of the detainee's absence are noted in the record.
- (2) Order U.S. military witnesses to appear and to request the appearance of civilian witnesses if, in the judgment of the Tribunal President those witnesses are reasonably available as defined in paragraph G (9) of this enclosure.
- (3) Request the production of such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, including information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings (cumulatively called hereinafter the "Government Information").
 - (a) For any relevant information not provided in response to a Tribunal's request, the agency holding the information shall provide either an acceptable substitute for the information requested or a certification to the Tribunal that none of the withheld information would support a determination that the detainee is not an enemy combatant. Acceptable substitutes may include an unclassified or, if not possible, a lesser classified, summary of the information; or a statement as to the relevant facts the information would tend to prove.
- (4) Require each witness (other than the detainee) to testify under oath. The detainee has the option of testifying under oath or unsworn. Forms of the oath for Muslim and non-Muslim witnesses are in the Tribunal Hearing Guide (enclosure (8)). The Tribunal Recorder will administer the oath.

F. The Detainee's Participation in the CSRT Process

- (1) The detainee may elect to participate in a Combatant Status Review Tribunal or may waive participation in the process. Such waiver shall be submitted to the Tribunal in writing by the detainee's Personal Representative and must be made after the Personal Representative has explained the Tribunal process and the opportunity of the detainee to contest this enemy combatant status. The waiver can be either an affirmative statement that the detainee declines to participate or can be inferred by the Personal Representative from the detainee's silence or actions when the Personal Representative explains the CSRT process to the detainee. The detainee's election shall be noted by the Personal Representative on enclosure (5).
- (2) If a detainee waives participation in the Tribunal process, the Tribunal shall still review the detainee's status without requiring the presence of the detainee.
- (3) A detainee who desires to participate in the Tribunal process shall be allowed to attend all Tribunal proceedings except for proceedings involving deliberation and voting by the members and testimony or other matters that would compromise national security if held in the presence of the detainee.
- (4) The detainee may not be compelled to testify or answer questions before the Tribunal other than to confirm his identity.
- (5) The detainee shall not be represented by legal counsel but will be aided by a Personal Representative who may, upon the detainee's election, assist the detainee at the Tribunal. He shall be provided with an interpreter during the Tribunal hearing if necessary.
- (6) The detainee may present evidence to the Tribunal, including the testimony of witnesses who are reasonably available and whose testimony is considered by the Tribunal to be relevant. Evidence on the detainee's behalf (other than his own testimony, if offered) may be presented in documentary form and through written statements, preferably sworn.
- (7) The detainee may present oral testimony to the Tribunal and may elect to do so under oath or affirmation or as unsworn testimony. If the detainee testifies, either under oath or unsworn, he may be questioned by the Recorder, Personal Representative, or Tribunal members, but may not be compelled to answer questions before the Tribunal.
- (8) The detainee's Personal Representative shall be afforded the opportunity to review the Government Information, and to consult with the detainee concerning his status as an enemy combatant and any challenge thereto. The Personal Representative may share the unclassified portion of the Government Information with the detainee.
- (9) The detainee shall be advised of the foregoing by his Personal Representative before the Tribunal is convened, and by the Tribunal President at the beginning of the hearing.

G. Tribunal Procedures

- (1) By July 17, 2004, the convening authority was required to notify each detainee of the opportunity to contest his status as an enemy combatant in the Combatant Status Review Tribunal process, the opportunity to consult with and be assisted by a Personal Representative, and of the jurisdiction of the courts of the United States to entertain a habeas corpus petition filed on the detainee's behalf. The English language version of this Notice to Detainees is at enclosure (4). All detainees were so notified July 12-14, 2004.
- (2) An officer appointed as a Personal Representative will meet with the detainee and, through an interpreter if necessary, explain the nature of the CSRT process to the detainee, explain his opportunity to personally appear before the Tribunal and present evidence, and assist the detainee in collecting relevant and reasonably available information and in preparing for and presenting information to the CSRT.
- (3) The Personal Representative will have the detainee make an election as to whether he wants to participate in the Tribunal process. Enclosure (5) is a Detainee Election Form. If the detainee elects not to participate, or by his silence or actions indicates that he does not want to participate, the Personal Representative will note this on the election form and this detainee will not be required to appear at his Tribunal hearing. The Director, CSRT, as convening authority, shall appoint a Tribunal as described in paragraph C (1) of this enclosure for all detainees after reviewing Nomination Questionnaires (enclosure (6)) and approving Tribunal panel members. Enclosure (7) is a sample Appointment Letter.
- (4) The Director, CSRT, will schedule a Tribunal hearing for a detainee within 30 days after the detainee's Personal Representative has reviewed the Government Information, had an opportunity to consult with the detainee, and notified the detainee of his opportunity to contest his status, even if the detainee declines to participate as set forth above. The Personal Representative will submit a completed Detainee Election Form to the Director, CSRT, or his designee when the Personal Representative has completed the actions above. The 30-day period to schedule a Tribunal will commence upon receipt of this form.
- (5) Once the Director, CSRT, has scheduled a Tribunal, the President of the assigned Tribunal panel may postpone the Tribunal for good cause shown to provide the detainee or his Personal Representative a reasonable time to acquire evidence deemed relevant and necessary to the Tribunal's decision, or to accommodate military exigencies as presented by the Recorder.
- (6) All Tribunal sessions except those relating to deliberation or voting shall be recorded on audiotape. Tribunal sessions where classified information is discussed shall be recorded on separate and properly marked audiotapes.

- (7) **Admissibility of Evidence.** The Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issues before it. At the discretion of the Tribunal, for example, it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances.
- (8) **Control of Case.** The President of the Tribunal is authorized to order the removal of any person from the hearing if that person is disruptive, uncooperative, or otherwise interferes with the Tribunal proceedings following a warning. In the case of the removal of the detainee from the Tribunal hearing, the detainee's Personal Representative shall continue in his role of assisting the detainee in the hearing.
- (9) **Availability of Witnesses.** The President of the Tribunal is the decision authority on reasonable availability of witnesses.
- (a) If such witnesses are from within the U.S. Armed Forces, they shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would adversely affect combat or support operations.
- (b) If such witnesses are not from within the U.S. Armed Forces, they shall not be considered reasonably available if they decline properly made requests to appear at a hearing, if they cannot be contacted following reasonable efforts by the CSRT staff, or if security considerations preclude their presence at a hearing. Non-U.S. Government witnesses will appear before the Tribunal at their own expense. Payment of expenses for U.S. Government witnesses will be coordinated by the CSRT staff and the witness's organization.
- (c) For any witnesses who do not appear at the hearing, the President of the Tribunal may allow introduction of evidence by other means such as e-mail, fax copies, and telephonic or video-telephonic testimony. Since either video-telephonic or telephonic testimony is equivalent to in-person testimony, the witness shall be placed under oath and is subject to questioning by the Tribunal.
- (10) **CSRT Determinations on Availability of Evidence.** If the detainee requests witnesses or evidence deemed not reasonably available, the President of the Tribunal shall document the basis for that decision; to include, for witnesses, efforts undertaken to procure the presence of the witness and alternatives considered or used in place of that witness's in-person testimony.
- (11) **Burden of Proof.** Tribunals shall determine whether the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant. There is a rebuttable presumption that the Government Evidence, as defined in paragraph H (4) herein, submitted by the Recorder to support a determination that the detainee is an enemy combatant, is genuine and accurate.

- (12) **Voting.** The decisions of the Tribunal shall be determined by a majority of the voting members of the Tribunal. A dissenting member shall prepare a brief summary of the basis for his/her opinion, which shall be attached to the record forwarded for legal review. Only the Tribunal members shall be present during deliberation and voting.

H. Conduct Of Hearing

A CSRT Hearing Guide is attached at enclosure (8) and provides guidance on the conduct of the Tribunal hearing. The Tribunal's hearing shall be substantially as follows:

- (1) The President shall call the Tribunal to order, and announce the order appointing the Tribunal (see enclosure (7)). The President shall also ensure that all participants are properly sworn to faithfully perform their duties.
- (2) The Recorder shall cause a record to be made of the time, date, and place of the hearing, and the identity and qualifications of all participants. All proceedings shall be recorded on audiotape except those portions relating to deliberations and voting. Tribunal sessions where classified information is discussed shall be recorded on separate and properly marked audiotapes.
- (3) The President shall advise the detainee of the purpose of the hearing, the detainee's opportunity to present evidence, and of the consequences of the Tribunal's decision. In cases requiring an interpreter, the President shall ensure the detainee understands these matters through the interpreter.
- (4) The Recorder shall present to the Tribunal such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant, including the circumstances of how the detainee was taken into the custody of U.S. or allied forces (the evidence so presented shall constitute the "Government Evidence"). In the event the Government Information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder shall also separately provide such evidence to the Tribunal.
- (5) The Recorder shall present to the Tribunal an unclassified report summarizing the Government Evidence and any evidence to suggest that the detainee should not be designated as an enemy combatant. This report shall have been provided to the detainee's Personal Representative in advance of the Tribunal hearing.
- (6) The Recorder shall call the witnesses, if any. Witnesses shall be excluded from the hearing except while testifying. An oath or affirmation shall be administered to each witness by the Recorder. When deemed necessary or appropriate, the Tribunal members can call witnesses who are reasonably available to testify or request the production of reasonably available documentary or other evidence.
- (7) The detainee shall be permitted to present evidence and question any witnesses. The Personal Representative shall assist the detainee in obtaining unclassified documents and in arranging the presence of witnesses reasonably available and, if the detainee elects, the Personal Representative shall assist the detainee in the presentation of

information to the Tribunal. The Personal Representative may, outside the presence of the detainee, present or comment upon classified information that bears upon the detainee's status if it would aid the Tribunal's deliberations.

- (8) When deemed necessary and appropriate by any member of the Tribunal, the Tribunal may recess the Tribunal hearing to consult with the Legal Advisor as to any issues relating to evidence, procedure, or other matters. The President of the Tribunal shall summarize on the record the discussion with the Legal Advisor when the Tribunal reconvenes.
- (9) The Tribunal shall deliberate in closed session with only voting members present. The Tribunal shall make its determination of status by a majority vote. The President shall direct a Tribunal member to document the Tribunal's decision on the Combatant Status Review Tribunal Decision Report cover sheet (enclosure (9)), which will serve as the basis for the Recorder's preparation of the Tribunal record. The unclassified reasons for the Tribunal's decision shall be noted on the Tribunal Decision Report cover sheet, and should include, as appropriate, the detainee's organizational membership or affiliation with a governmental, military, or terrorist organization (*e.g.*, Taliban, al Qaida, etc.). A dissenting member shall prepare a brief summary of the basis for his/her opinion.
- (10) Both documents shall be provided to the Recorder as soon as practicable after the Tribunal concludes.

I. Post-Hearing Procedures

- (1) The Recorder shall prepare the record of the hearing and ensure that the audiotape is preserved and properly classified in conformance with security regulations.
- (2) The detainee's Personal Representative shall be provided the opportunity to review the record prior to the Recorder forwarding it to the President of the Tribunal. The Personal Representative may submit, as appropriate, observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record.
- (3) The Recorder shall provide the completed record to the President of the Tribunal for signature and forwarding for legal review.
- (4) In all cases the following items will be attached to the decision which, when complete and signed by the Tribunal President, shall constitute the record:
 - (a) A statement of the time and place of the hearing, persons present, and their qualifications;
 - (b) The Tribunal Decision Report cover sheet;
 - (c) The classified and unclassified reports detailing the findings of fact upon which the Tribunal decision was based;

- (d) Copies of all documentary evidence presented to the Tribunal and summaries of all witness testimony. If classified material is part of the evidence submitted or considered by the Tribunal, the report will be properly marked and handled in accordance with all applicable security regulations; and
- (e) A dissenting member's summary report, if any.
- (5) The President of the Tribunal shall forward the Tribunal's decision and all supporting documents as set forth above to the Director, CSRT, acting as Convening Authority, via the CSRT Legal Advisor, within three working days of the date of the Tribunal decision. If additional time is needed, the President of the Tribunal shall request an extension from the Director, CSRT.
- (6) The Recorder shall ensure that all audiotapes of the Tribunal hearing are properly marked with identifying information and classification markings, and stored in accordance with all applicable security regulations. These tapes may be reviewed and transcribed as necessary for the legal sufficiency and Convening Authority reviews.
- (7) The CSRT Legal Advisor shall conduct a legal sufficiency review of all cases. The Legal Advisor shall render an opinion on the legal sufficiency of the Tribunal proceedings and forward the record with a recommendation to the Director, CSRT. The legal review shall specifically address Tribunal decisions regarding reasonable availability of witnesses and other evidence.
- (8) The Director, CSRT, shall review the Tribunal's decision and may approve the decision and take appropriate action, or return the record to the Tribunal for further proceedings. In cases where the Tribunal decision is approved and the case is considered final, the Director, CSRT, shall so advise the DoD Office of Detainee Affairs, the Secretary of State, and any other relevant U.S. Government agencies.
- (9) If the Tribunal determines that the detainee shall no longer be classified as an enemy combatant, and the Director, CSRT, approves the Tribunal's decision, the Director, CSRT, shall forward the written report of the Tribunal's decision directly to the Secretary of the Navy. The Secretary of the Navy shall so advise the DoD Office of Detainee Affairs, the Secretary of State, and any other relevant U.S. Government agencies, in order to permit the Secretary of State to coordinate the transfer of the detainee with representatives of the detainee's country of nationality for release or other disposition consistent with applicable laws. In these cases the Director, CSRT, will ensure coordination with the Joint Staff with respect to detainee transportation issues.
- (10) The detainee shall be notified of the Tribunal decision by the Director, CSRT. If the detainee has been determined to no longer be designated as an enemy combatant, he shall be notified of the Tribunal decision upon finalization of transportation arrangements or at such earlier time as deemed appropriate by the Commander, JTF-GTMO.

Recorder Qualifications, Roles and Responsibilities

A. Qualifications of the Recorder

- (1) For each case, the Director, CSRT, shall select a commissioned officer in the grade of O-3 or higher, preferably a judge advocate, to serve as a Recorder.
- (2) Recorders must have at least a TOP SECRET security clearance. The Director shall ensure that only properly cleared officers are assigned as Recorders.

B. Roles of the Recorder

- (1) Subject to section C (1), below, the Recorder has a duty to present to the CSRT such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant, including the circumstances of how the detainee was taken into the custody of U.S. or allied forces (the "Government Evidence"). In the event the Government Information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder shall also provide such evidence to the Tribunal.
- (2) The Recorder shall have due regard for classified information and safeguard it in accordance with all applicable instructions and regulations. The Recorder shall coordinate with an Information Security Officer (ISO) in the handling and safeguarding of classified material before, during, and following the Tribunal process.

C. Responsibilities of the Recorder

- (1) For each assigned detainee case under review, the Recorder shall obtain and examine the Government Information as defined in paragraph E (3) of enclosure (1).
- (2) The Recorder shall draft a proposed unclassified summary of the relevant evidence derived from the Government Information.
- (3) The Recorder shall ensure appropriate coordination with original classification authorities for any classified information presented that was used in the preparation of the proposed unclassified summary.
- (4) The Recorder shall permit the assigned Personal Representative access to the Government Information and will provide the unclassified summary to the Personal Representative in advance of the Tribunal hearing.
- (5) The Recorder shall ensure that coordination is maintained with Joint Task Force-Guantanamo Bay and the Criminal Investigative Task Force to deconflict any other ongoing activities and arrange for detainee movements and security.
- (6) The Recorder shall present the Government Evidence orally or in documentary form to the Tribunal. The Recorder shall also answer questions, if any, asked by the Tribunal.

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Enclosure (2)

- (7) The Recorder shall administer an appropriate oath to the Tribunal members, the Personal Representative, the paralegal/reporter, the interpreter, and all witnesses (including the detainee if he elects to testify under oath).
- (8) The Recorder shall prepare a Record of Proceedings, and, if applicable, a record of the dissenting member's report. The Record of Proceedings should include:
 - (a) A statement of the time and place of the hearing, persons present, and their qualifications;
 - (b) The Tribunal Decision Report cover sheet;
 - (c) The classified and unclassified reports detailing the findings of fact upon which the Tribunal decision was based;
 - (d) Copies of all documentary evidence presented to the Tribunal and summaries of all witness testimony. If classified material is part of the evidence submitted or considered by the Tribunal, the report will be properly marked and handled in accordance with applicable security regulations; and
 - (e) A dissenting member's summary report, if any.
- (9) The Recorder shall provide the detainee's Personal Representative the opportunity to review the record prior to the Recorder forwarding it to the President of the Tribunal. The Personal Representative may submit, as appropriate, observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record.
- (10) The Recorder shall submit the completed Record of Proceedings to the President of the Tribunal who shall sign and forward it to the Director, CSRT via the CSRT Legal Advisor. Once signed by the Tribunal President, the completed record is considered the official record of the Tribunal's decision.
- (11) The Recorder shall ensure that all audiotapes of the Tribunal hearing are properly marked with identifying information and classification markings, and stored in accordance with applicable security regulations. These tapes are considered part of the case record and may be reviewed and transcribed as necessary for the legal sufficiency and convening authority reviews.

Personal Representative Qualifications, Roles and Responsibilities

A. Qualifications of Personal Representative

- (1) For each case, the Director, CSRT, shall select a commissioned officer serving in the grade of O-4 or higher to serve as a Personal Representative. The Personal Representative shall not be a judge advocate.
- (2) Personal Representatives must have at least a TOP SECRET security clearance. The Director shall ensure that only properly cleared officers are assigned as Personal Representatives.

B. Roles of the Personal Representative

- (1) The detainees were notified of the Tribunal process per reference (a). When detailed to a detainee's case the Personal Representative shall further explain the nature of the CSRT process to the detainee, explain his opportunity to present evidence and assist the detainee in collecting relevant and reasonably available information and in preparing and presenting information to the Tribunal.
- (2) The Personal Representative shall have due regard for classified information and safeguard it in accordance with all applicable instructions and regulations. The Personal Representative shall coordinate with an Information Security Officer (ISO) in the handling and safeguarding of classified material before, during, and after the Tribunal process.

C. Responsibilities of the Personal Representative

- (1) The Personal Representative is responsible for explaining the nature of the CSRT process to the detainee. Upon first contact with the detainee, the Personal Representative shall explain to the detainee that no confidential relationship exists or may be formed between the detainee and the Personal Representative. The Personal Representative shall explain the detainee's opportunity to make a personal appearance before the Tribunal. The Personal Representative shall request an interpreter, if needed, to aid the detainee in making such appearance and in preparing his presentation. The Personal Representative shall explain to the detainee that he may be subject to questioning by the Tribunal members, but he cannot be compelled to make any statement or answer any questions. Paragraph D, below, provides guidelines for the Personal Representative meeting with the enemy combatant prior to his appearance before the Tribunal.
- (2) After the Personal Representative has reviewed the Government Information, had an opportunity to consult with the detainee, and notified the detainee of his opportunity to contest his status, even if the detainee declines to participate as set forth above, the Personal Representative shall complete a Detainee Election Form (enclosure (5)) and provide this form to the Director, CSRT.

RE 14
Enclosure (3)

- (3) The Personal Representative shall review the Government Evidence that the Recorder plans to present to the CSRT and shall permit the Recorder to review documentary evidence that will be presented to the CSRT on the detainee's behalf.
- (4) Using the guidelines set forth in paragraph D, the Personal Representative shall meet with the detainee, using an interpreter if necessary, in advance of the CSRT. In no circumstance shall the Personal Representative disclose classified information to the detainee.
- (5) If the detainee elects to participate in the Tribunal process, the Personal Representative shall present information to the Tribunal if the detainee so requests. The Personal Representative may, outside the presence of the detainee, comment upon classified information submitted by the Recorder that bears upon the presentation made on the detainee's behalf, if it would aid the Tribunal's deliberations.
- (6) If the detainee elects not to participate in the Tribunal process, the Personal Representative shall assist the detainee by presenting information to the Tribunal in either open or closed sessions and may, in closed sessions, comment upon classified information submitted by the Recorder that bears upon the detainee's presentation, if it would aid the Tribunal's deliberations.
- (7) The Personal Representative shall answer questions, if any, asked by the Tribunal.
- (8) The Personal Representative shall be provided the opportunity to review the record prior to the Recorder forwarding it to the President of the Tribunal. The Personal Representative may submit, as appropriate, observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record.

D. Personal Representative Guidelines for Assisting the Enemy Combatant

In discussing the CSRT process with the detainee and completing the Detainee Election Form, the Personal Representative shall use the guidelines provided below to assist the detainee in preparing for the CSRT:

You have already been advised that a Combatant Status Review Tribunal has been established by the United States government to review your classification as an enemy combatant.

A Tribunal of military officers shall review your case in "x" number of days [or other time frame as known], and I have been assigned to ensure you understand this process. The Tribunal shall review your case file, offer you an opportunity to speak on your own behalf if you desire, and ask questions. You also can choose not to appear at the Tribunal hearing. In that case I will be at the hearing and will assist you if you want me to do so.

You will be provided with an opportunity to review unclassified information that relates to your classification as an enemy combatant. I will be able to review additional information that is classified. I can discuss the unclassified information with you.

You will be allowed to attend all Tribunal proceedings, except for proceedings involving deliberation and voting by the members, and testimony or other matters that would compromise U.S. national security if you attended. You will not be forced to attend, but if you choose not to attend, the Tribunal will be held in your absence and I will attend.

You will have the opportunity to question witnesses testifying at the Tribunal.

You will have the opportunity to present evidence to the Tribunal, including calling witnesses to testify on your behalf if those witnesses are reasonably available. If a witness is not considered by the Tribunal as reasonably available to testify in person, the Tribunal can consider evidence submitted by telephone, written statements, or other means rather than having a witness testify in person. I am available to assist you in gathering and presenting these materials, should you desire to do so. After the hearing, the Tribunal shall determine whether you should continue to be designated as an enemy combatant.

I am neither a lawyer nor your advocate, but have been given the responsibility of assisting your preparation for the hearing. None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing.

I am available to assist you in preparing an oral or written presentation to the Tribunal should you desire to do so. I am also available to speak for you at the hearing if you wish that kind of assistance.

Do you understand the process or have any questions about it?

The Tribunal is examining one issue: whether you are an enemy combatant against the United States or its coalition partners. Any information you can provide to the Tribunal relating to your activities prior to your capture is very important in answering this question. However, you may not be compelled to testify or answer questions at the Tribunal hearing.

Do you want to participate in the Tribunal process and appear before the Tribunal?

Do you wish to present information to the Tribunal or have me present information for you?

Is there anyone here in the camp or elsewhere who can testify on your behalf regarding your capture or status?

Do you want to have anyone else submit any information to the Tribunal regarding your status? [If so,] how do I contact them? If feasible and you can show the Tribunal how the information is relevant to your case, the Tribunal will endeavor to arrange for evidence to be provided by other means such as mail, e-mail, faxed copies, or telephonic or video-telephonic testimony.

Do you have any questions?

Combatant Status Review Tribunal Notice to Detainees*

You are being held as an enemy combatant by the United States Armed Forces. An enemy combatant is an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. The definition includes any person who has committed a belligerent act or has directly supported such hostilities.

The U.S. Government will give you an opportunity to contest your status as an enemy combatant. Your case will go before a Combatant Status Review Tribunal, composed of military officers. This is not a criminal trial and the Tribunal will not punish you, but will determine whether you are properly held. The Tribunal will provide you with the following process:

1. You will be assigned a military officer to assist you with the presentation of your case to the Tribunal. This officer will be known as your Personal Representative. Your Personal Representative will review information that may be relevant to a determination of your status. Your Personal Representative will be able to discuss that information with you, except for classified information.
2. Before the Tribunal proceeding, you will be given a written statement of the unclassified factual basis for your classification as an enemy combatant.
3. You will be allowed to attend all Tribunal proceedings, except for proceedings involving deliberation and voting by the members, and testimony or other matters that would compromise U.S. national security if you attended. You will not be forced to attend, but if you choose not to attend, the Tribunal will be held in your absence. Your Personal Representative will attend in either case.
4. You will be provided with an interpreter during the Tribunal hearing if necessary.
5. You will be able to present evidence to the Tribunal, including the testimony of witnesses. If those witnesses you propose are not reasonably available, their written testimony may be sought. You may also present written statements and other documents. You may testify before the Tribunal but will not be compelled to testify or answer questions.

As a matter separate from these Tribunals, United States courts have jurisdiction to consider petitions brought by enemy combatants held at this facility that challenge the legality of their detention. You will be notified in the near future what procedures are available should you seek to challenge your detention in U.S. courts. Whether or not you decide to do so, the Combatant Status Review Tribunal will still review your status as an enemy combatant.

If you have any questions about this notice, your Personal Representative will be able to answer them.

[*Text of Notice translated, and delivered to detainees 12-14 July 2004]

Sample Detainee Election Form

Date/Time: _____

ISN#: _____

Personal Representative: _____
[Name/Rank]

Translator Required? _____ Language? _____

CSRT Procedures Read to Detainee or Written Copy Read by Detainee? _____

Detainee Election:

- ☐ **Wants to Participate in Tribunal**
- ☐ **Wants Assistance of Personal Representative**
- ☐ **Affirmatively Declines to Participate in Tribunal**
- ☐ **Uncooperative or Unresponsive**

Personal Representative Comments:

Personal Representative

Sample Nomination Questionnaire



Department of Defense Director, Combatant Status Review Tribunals

As a candidate to become a Combatant Status Review Tribunal member, Recorder, or Personal Representative, please complete the following questionnaire and provide it to the Director, Combatant Status Review Tribunal (CSRT). Because of the sensitive personal information requested, no copy will be retained on file outside of the CSRT.

1. Name (Last, First MI) _____ 2. Rank/Grade _____
3. Date of Rank _____ 4. Service _____ 5. Active Duty Service Date _____
6. Desig/MOS _____ 7. Date Current Tour Began: _____
8. Security Clearance Level _____ 9. Date of clearance: _____
10. Military Awards / Decorations: _____

11. Current Duty Position _____ 12. Unit: _____
13. Date of Birth _____ 14. Gender _____ 15. Race or Ethnic Origin _____
16. Civilian Education. College/Vocational/Civilian Professional School: _____
17. Date graduated or dates attended (and number of years), school, location, degree/major: _____

18. Military Education. Dates attended, school/course title. _____

19. Duty Assignments. Last four assignments, units, and dates of assignments. _____

20. Have you had any relative or friend killed or wounded in Afghanistan or Iraq? _____ Explain.

21. Have you had any close relative or friend killed, wounded, or impacted by the events of September 11, 2001? Explain.

22. Have you ever been in an assignment related to enemy prisoners of war or enemy combatants, to include the apprehension, detention, interrogation, or previous determination of status of a detainee at Guantanamo Bay? Explain.

23. Do you believe you may be disqualified to serve as a Tribunal member, Recorder, or Personal Representative for any reason? Explain.

24. Your name or image as well as information related to the enemy combatant may be released to the public in conjunction with the Combatant Status Review Tribunal process. Could this potential public affairs release affect your ability to objectively serve in any capacity in the Tribunal process?

Y/N Explain.

SIGNATURE OF OFFICER: _____ DATE: _____

Approved _____ Disapproved _____ Director, CSRT

Sample Appointment Letter for Combatant Status Review Tribunal Panel



**Department of Defense
Director, Combatant Status Review Tribunals**

Ser

From: Director, Combatant Status Review Tribunals

Subj: APPOINTMENT OF COMBATANT STATUS REVIEW TRIBUNAL

Ref: (a) Convening Authority Appointment Letter of 7 July 2004

By the authority given to me in reference (a), a Combatant Status Review Tribunal established by DCN XXX "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba" is hereby convened. It shall hear such cases as shall be brought before it without further action of referral or otherwise.

The following commissioned officers shall serve as members of the Tribunal:

MEMBERS:

XXX, 999-99-9999; President*

YYY, 999-99-9999; Member*

ZZZ, 999-99-9999; Member*

**J.M. MCGARRAH
RADM, CEC, USNR**

[* The Order should note which member is the Judge Advocate required to be on the Tribunal.]

Combatant Status Review Tribunal Hearing Guide

RECORDER: All rise. (The Tribunal enters)

[In Tribunal sessions where the detainee has waived participation, the Tribunal can generally omit the *italicized* portions.]

PRESIDENT: This hearing shall come to order.

RECORDER: This Tribunal is being conducted at [Time/Date] on board Naval Base Guantanamo Bay, Cuba. The following personnel are present:

_____, President

_____, Member

_____, Member

_____, Personal Representative

_____, Interpreter,

_____, Reporter/Paralegal, and

_____, Recorder

[Rank/Name] is the Judge Advocate member of the Tribunal.

PRESIDENT: The Recorder will be sworn. Do you, (name and rank of the Recorder) swear (or affirm) that you will faithfully perform the duties assigned in this Tribunal (so help you God)?

RECORDER: I do.

PRESIDENT: The reporter/paralegal will now be sworn.

RECORDER: Do you (name and rank of reporter/paralegal) swear or affirm that you will faithfully discharge your duties as assigned in this tribunal?

REPORTER/PARALEGAL: I do.

PRESIDENT: *The interpreter will be sworn. [If needed for witness testimony when detainee not present]*

RECORDER: *Do you swear (or affirm) that you will faithfully perform the duties of interpreter in the case now hearing (so help you God)?*

INTERPRETER: I do.

RE 14

Enclosure (8)

PRESIDENT: *We will take a brief recess while the detainee is brought into the room.*

RECORDER: *All Rise.*

[Tribunal members depart, followed by the Recorder, Personal Representative, Interpreter, and Court Reporter. The detainee is brought into the room. All participants except the Tribunal members return to the Tribunal room.]

RECORDER: *All Rise. [The Tribunal members enter the room.]*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: This hearing will come to order. You may be seated.

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *(NAME OF DETAINEE)*, this Tribunal is convened by order of the Director, Combatant Status Review Tribunals under the provisions of his Order of XX July 2004. It will determine whether you *[or Name of Detainee]* meet the criteria to be designated as an enemy combatant against the United States or its allies or otherwise meet the criteria to be designated as an enemy combatant.

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: This Tribunal shall now be sworn. All rise.

INTERPRETER: *(TRANSLATION OF ABOVE).*

[All persons in the room stand while Recorder administers the oath. Each voting member raises his or her right hand as the Recorder administers the following oath:]

RECORDER: Do you swear (affirm) that you will faithfully perform your duties as a member of this Tribunal; that you will impartially examine and inquire into the matter now before you according to your conscience, and the laws and regulations provided; that you will make such findings of fact and conclusions as are supported by the evidence presented; that in determining those facts, you will use your professional knowledge, best judgment, and common sense; and that you will make such findings as are appropriate according to the best of your understanding of the rules, regulations, and laws governing this proceeding, and guided by your concept of justice (so help you God)?

MEMBERS OF TRIBUNAL: I do.

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: The Recorder will now administer the oath to the Personal

Representative.

INTERPRETER: (TRANSLATION OF ABOVE).

[The Tribunal members lower their hands but remain standing while the following oath is administered to the Personal Representative:]

RECORDER: Do you swear (or affirm) that you will faithfully perform the duties of Personal Representative in this Tribunal (so help you God)?

PERSONAL REPRESENTATIVE: I do.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: Please be seated. The Reporter, Recorder, and Interpreter have previously been sworn. This Tribunal hearing shall come to order.

[All personnel resume their seats.]

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: (NAME OF DETAINEE), you are hereby advised that the following applies during this hearing:

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may be present at all open sessions of the Tribunal. However, if you become disorderly, you will be removed from the hearing, and the Tribunal will continue to hear evidence.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may not be compelled to testify at this Tribunal. However, you may testify if you wish to do so. Your testimony can be under oath or unsworn.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may have the assistance of a Personal Representative at the hearing. Your assigned Personal Representative is present.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may present evidence to this Tribunal, including the testimony of witnesses who are reasonably available. You may question witnesses testifying at the Tribunal.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may examine documents or statements offered into evidence other than classified information. However, certain documents may be partially masked for security reasons.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: Do you understand this process?

INTERPRETER: (TRANSLATION OF ABOVE)

PRESIDENT: Do you have any questions concerning the Tribunal process?

INTERPRETER: (TRANSLATION OF ABOVE)

[In Tribunal sessions where the detainee has waived participation substitute:

PRESIDENT: [Rank/Name of Personal Representative] you have advised the Tribunal that [Name of Detainee] has elected to not participate in this Tribunal proceeding. Is that still the situation?

PERSONAL

REPRESENTATIVE: Yes/No. [Explain].

PRESIDENT: Please provide the Tribunal with the Detainee Election Form marked as Exhibit D-a.]

[Presentation of Unclassified Information by Recorder and Detainee or his Personal Representative. Recorder evidence shall be marked in sequence R-1, R-2, etc. while evidence presented for the detainee shall be marked in sequence D-a, D-b, etc.]

[The Interpreter shall translate as necessary during this portion of the Tribunal.]

PRESIDENT: Recorder, please provide the Tribunal with the unclassified evidence.

RECORDER: I am handing the Tribunal what has previously been marked as Exhibit R-1, the unclassified summary of the evidence that relates to this detainee's status as an enemy combatant. A translated copy of this exhibit was provided to the Personal Representative in advance of this hearing for presentation to the detainee. In addition, I am handing to the Tribunal the following unclassified exhibits, marked as Exhibit R-2 through R-x. Copies of these Exhibits have previously been provided to the Personal Representative.

PRESIDENT: Does the Recorder have any witnesses to present?

RECORDER: Yes/no.

If witnesses appear before the Tribunal, the Recorder shall administer an appropriate oath:

Form of Oath for a Muslim

Do you [Name], in the Name of Allah, the Most Compassionate, the Most Merciful, swear that your testimony before this Tribunal will be the truth?

Form of Oath or Affirmation for Others

Do you (swear) (affirm) that the statements you are about to make shall be the truth, the whole truth, and nothing but the truth (so help you God)?

INTERPRETER: (TRANSLATION AS NECESSARY)

[Witnesses may be questioned by the Tribunal members, the Recorder, the Personal Representative, or the detainee.]

RECORDER: Mr./Madam President, I have no further unclassified information for the Tribunal but request a closed Tribunal session at an appropriate time to present classified information relevant to this detainee's status as an enemy combatant.

PRESIDENT: [Name of detainee] (or Personal Representative), do you (or does the detainee) want to present information to this Tribunal?

[If detainee not present, Personal Representative may present information to the Tribunal.]

INTERPRETER: (TRANSLATION OF ABOVE).

[If the detainee elects to make an oral statement:]

PRESIDENT: [Name of detainee] would you like to make your statement under oath?

INTERPRETER: (TRANSLATION OF ABOVE).

[After statement is completed:]

PRESIDENT: [Name of detainee] does that conclude your statement?

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: [Determines whether Tribunal members, Recorder, or Personal Representative have any questions for detainee.]

PRESIDENT: *[Name of detainee] do you have any other evidence to present to this Tribunal?*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: All unclassified evidence having been provided to the Tribunal, this concludes this Tribunal session.

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *(Name of detainee), you shall be notified of the Tribunal decision upon completion of the review of these proceedings by the convening authority in Washington, D.C.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *If the Tribunal determines that you should not be classified as an enemy combatant, you will be released to your home country as soon as arrangements can be made.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *If the Tribunal confirms your classification as an enemy combatant you shall be eligible for an Administrative Review Board hearing at a future date.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *That Board will make an assessment of whether there is continued reason to believe that you pose a threat to the United States or its allies in the ongoing armed conflict against terrorist organizations such as al Qaida and its affiliates and supporters or whether there are other factors bearing upon the need for continued detention.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *You will have the opportunity to be heard and to present information to the Administrative Review Board. You can present information from your family that might help you at the Board. You are encouraged to contact your family as soon as possible to begin to gather information that may help you.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *A military officer will be assigned at a later date to assist you in the Administrative Review Board process.*

INTERPRETER: *(TRANSLATION OF ABOVE)*

PRESIDENT: This Tribunal hearing is adjourned.

RECORDER: All Rise. [If moving into Tribunal session in which classified material will be discussed add:] This Tribunal is commencing a closed session. Will everyone but the Tribunal members, Personal Representative, and Reporter/Paralegal please leave the Tribunal room.

PRESIDENT: [When Tribunal room is ready for closed session.] You may be seated. The Tribunal for [Name of detainee] is now reconvened without the detainee being present to prevent a potential compromise of national security due to the classified nature of the evidence to be considered. The Recorder will note the date and time of this session for the record.

[Closed Tribunal Session Commences, as necessary, with only properly cleared personnel present. Presentation of classified information by Recorder and, when appropriate, Personal Representative. Recorder evidence shall be marked in sequence R-1, R-2, etc. while evidence presented for the detainee shall be marked in sequence D-a, D-b, etc. All evidence will be properly marked with the security classification.]

PRESIDENT: This Tribunal session is adjourned and the Tribunal is closed for deliberation and voting.

RECORDER: Notes time and date when Tribunal closed.

[CLASSIFICATION]

Combatant Status Review Tribunal Decision Report Cover Sheet

[CLASSIFICATION]: UNCLASSIFIED Upon Removal of Enclosure(s) (2) [and (3)]

TRIBUNAL PANEL: _____

ISN #: _____

DATE: _____

Ref: (a) Convening Order of XX YYY 2004
(b) CSRT Implementation Directive of XX July 2004
(c) DEPSECDEF Memo of 7 July 2004

Encl: (1) Unclassified Summary of Basis for Tribunal Decision (U)
(2) Classified Summary of Basis for Tribunal Decision (U)
(3) Copies of Documentary Evidence Presented (U)

This Tribunal was convened by references (a) and (b) to make a determination as to whether the detainee meets the criteria to be designated as an enemy combatant as defined in reference (c).

The Tribunal has determined that he (is) (is not) designated as an enemy combatant as defined in reference (c).

[If yes] In particular the Tribunal finds that this detainee is a member of, or affiliated with, _____ (al Qaida, Taliban, other), as more fully discussed below and in the enclosures.

Enclosure (1) provides an unclassified account of the basis for the Tribunal's decision, as summarized below. A detailed account of the evidence considered by the Tribunal and its findings of fact are contained in enclosure (2).

(Rank, Name) President

RE 14
Enclosure (9)

Office of the Presiding Officer
Military Commission

August 27, 2004

Order of the Presiding Officer

UNITED STATES v. SALEM AHMED SALEM **HAMDAN**

Attached are three Protective Orders in the above-styled case. All counsel agreed to the Presiding Officer's having signed the said Orders, and all parties have received copies of the said Orders.

The orders are: Protective Order #1; Protective Order # 2; and Protective Order # 2A.

The reporter will append this Order, and the three attached, Protective Orders to the Record of Trial in the above styled case as the Review Exhibits next in order.



Peter E. Brownback III
COL, JA, USA
Presiding Officer

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

PROTECTIVE ORDER # 2

August 27, 2004

The following Order is issued to protect from unauthorized disclosure documents and information provided to the Defense in the above-captioned Military Commission case, and is therefore directed to the Defense.

For the purpose of this Order, the term “you” or “your” shall pertain to all members of the Military Commission Defense team.

This Protective Order pertains to all documents and information previously provided to the Military Commission Defense team as well as any documents or information that may be provided to the Military Commission Defense team in the future. It shall remain in effect throughout your representation of Mr. Hamdan unless specifically modified or cancelled.

UNCLASSIFIED SENSITIVE MATERIALS

IT IS HEREBY ORDERED that all documents marked "For Official Use Only (FOUO)" or "Law Enforcement Sensitive" and the information contained therein shall only be disseminated to the following individuals:

- Members of the Military Commission Defense team to include paralegals, designated investigators, designated experts and administrative staff, with an official need to know. Additionally dissemination is authorized to the Accused;
- Other members of the U.S. Government Executive and Judicial branches where disclosure is deemed necessary by a Military Commission Defense Attorney of Record for the purpose of preparing the defense of this Military Commission case;
- Disclosure to individuals outside the Military Commission Defense team and these other Executive and Judicial branch employees requires the Defense to file a motion to the Commission requesting such disclosure. The Defense shall provide justification in this motion as to why such disclosure is necessary for the preparation of the defense. Input from the agencies having ownership interests in the information will be obtained prior to the Commission authorizing any such disclosure. Absent extraordinary circumstances and specific authorization from the Commission, any approved disclosures will not

permit the actual documents or other media containing the information to be provided directly to these individuals. The appropriate method of dissemination will be verbal;

- The Military Commission panel and parties to the case in the course of Military Commission proceedings.

IT IS FURTHER ORDERED that Criminal Investigation Task Force Forms 40 and Federal Bureau of Investigation FD-302s provided to the Defense shall, unless classified (marked "CONFIDENTIAL," "SECRET," or "TOP SECRET"), be handled and disseminated as "For Official Use Only" and/or "Law Enforcement Sensitive."

CLASSIFIED MATERIALS

IT IS FURTHER ORDERED that you shall become familiar with Executive Order 12958 (as amended), Military Commission Order No. 1, and other directives applicable to the proper handling, storage, and protection of classified information. All classified documents (those marked "CONFIDENTIAL," "SECRET," or "TOP SECRET") and the information contained therein shall only be disseminated to the following individuals:

- Members of the Military Commission Defense team who have the appropriate security clearance and an official need to know the information to assist the Defense in the representation of the Accused before a Military Commission; and
- The Military Commission panel in the course of Military Commission proceedings. It shall be your responsibility to ensure that if you are presenting classified information to the panel, that you take appropriate measures to protect such information.

IT IS FURTHER ORDERED that all classified or sensitive discovery materials, and copies thereof, given to the Defense or shared with any authorized person by the Defense must and shall be returned to the government at the conclusion of the review and final decision by the President or, if designated, the Secretary of Defense, in each case.

BOOKS, ARTICLES, OR SPEECHES

FINALLY, IT IS ORDERED that members of the Military Commission Defense team shall not divulge, publish or reveal, either by word, conduct, or any other means, any documents or information protected by this Order unless specifically authorized to do so. Prior to publication, members of the Military Commission Defense team shall submit any book, article, speech, or other publication derived from, or based upon experience or information gained in the course of representation of Salim Ahmed Hamdan to the Department of Defense for review. This review is solely to ensure that no information is improperly disclosed that is classified, protected, or otherwise subject to a Protective

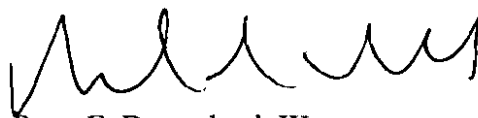
Review Exhibit 15

Page 5 of 9

Order. This restriction will remain binding after the conclusion of any proceedings that may occur against Salim Ahmed Hamdan.

BREACH

Any breach of this Protective Order may result in disciplinary action or other sanctions.



Peter E. Brownback III
Colonel, JA, U.S. Army
Presiding Officer

Review Exhibit 15

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permit the actual documents or other media containing the information to be provided directly to these individuals. The appropriate method of dissemination will be verbal;

- The Military Commission panel and parties to the case in the course of Military Commission proceedings.

IT IS FURTHER ORDERED that Criminal Investigation Task Force Forms 40 and Federal Bureau of Investigation FD-302s provided to the Prosecution shall, unless classified (marked "CONFIDENTIAL," "SECRET," or "TOP SECRET"), be handled and disseminated as "For Official Use Only" and/or "Law Enforcement Sensitive."

CLASSIFIED MATERIALS

IT IS FURTHER ORDERED that you shall become familiar with Executive Order 12958 (as amended), Military Commission Order No. 1, and other directives applicable to the proper handling, storage, and protection of classified information. All classified documents (those marked "CONFIDENTIAL," "SECRET," or "TOP SECRET") and the information contained therein shall only be disseminated to the following individuals:

- Members of the Military Commission Prosecution Office who have the appropriate security clearance and an official need to know the information to assist the Prosecution in the representation of the Accused before a Military Commission; and
- The Military Commission panel in the course of Military Commission proceedings. It shall be your responsibility to ensure that if you are presenting classified information to the panel, that you take appropriate measures to protect such information.

IT IS FURTHER ORDERED that all classified or sensitive discovery materials, and copies thereof, given to the Prosecution or shared with any authorized person by the Prosecution must and shall be returned to the government at the conclusion of the review and final decision by the President or, if designated, the Secretary of Defense, in each case.

BOOKS, ARTICLES, OR SPEECHES

FINALLY, IT IS ORDERED that members of the Military Commission Prosecution Office shall not divulge, publish or reveal, either by word, conduct, or any other means, any documents or information protected by this Order unless specifically authorized to do so. Prior to publication, members of the Military Commission Prosecution Office shall submit any book, article, speech, or other publication the contents of which in a whole or part is derived from information subject to this ordered to the Department of Defense for review. This review is solely to ensure that no information is improperly disclosed that is classified, protected, or otherwise subject to a

Protective Order. This restriction will remain binding after the conclusion of any proceedings that may occur against Salim Ahmed Hamdan.

BREACH

Any breach of this Protective Order may result in disciplinary action or other sanctions.



Peter E. Brownback III
Colonel, JA, U.S. Army
Presiding Officer

Review Exhibit 15

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